Supreme Court, U.S.
FILED

(1) 02 865 NOV 12 2002

No. OFFICE OF THE CLERK

In the

Supreme Court of the United States

LOBO GAMING, INC.,

Petitioner,

v.

PIT RIVER TRIBE OF CALIFORNIA,
and PIT RIVER GAMING COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF CALIFORNIA
THIRD APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

John Fredericks III
Counsel of Record
FREDERICKS, PELCYGER &
HESTER, LLC
1075 South Boulder Road
Suite 305
Louisville, CO 80027
Tel: (303) 673-9600
Fax: (303) 673-9155
Attorneys for Petitioner

CURRY & TAYLOR • (202) 393-4141 • HTTP://USSCINFO.COM

47 pp

QUESTIONS PRESENTED

1. Should courts resolve issues of tribal sovereign immunity by applying uniform principles of federal law?

2. Under federal law, does the governing body of an Indian tribe have the authority to waive the tribe's sovereign immunity in cases where the governing body is expressly authorized to enter into contracts on the tribe's behalf?

3. Is the Pit River Indian Tribe barred from asserting sovereign immunity from a suit on a contract when the contract was duly authorized and executed by the Tribal Council and the contract itself contains a waiver of the Tribe's immunity from suit?

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner states that it has no corporate parents and no publicly held company owns 10% or more of Petitioner's stock.

TABLE OF CONTENTS

QUESTION PRESENTED i

RULE 29.1 ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 6

CONCLUSION 23

APPENDIX

COURT OF APPEAL OPINION (5/7/2002) 1a

SUPERIOR COURT ORDER (1/26/2001) 15a

SUPREME COURT ORDER (8/14/2002) 17a

DISTRICT COURT ORDER (3/15/00) 15a

TABLE OF AUTHORITIES

CASES

ACE FLYING SERVICE, INC. v. COLORADO DEPT. OF AGRICULTURE, 314 P.2D 278, 280 (COLO. 1957) 18
AQUAMAR v. DEL MONTE FRESH PRODUCE, 179 F.3D 1279, 1294 N. 36 (11TH CIR. 1999) 10
ARCHITECTURAL WOODS, INC. v. WASHINGTON, 598 P.2D 1372, 1375 (WASH. 1979) 18
ART. VII §3.A OF THE TRIBAL CONSTITUTION 5
C & L ENTERPRISES, INC. v. CITIZEN BAND POTOWATOMI TRIBE OF OKLAHOMA, 532 U.S. 411 (2001) 7, 9, 22
DADE COUNTY v. AMERICAN RE-INSURANCE CO., 467 SO.2D 414 (FLA. DIST. CT. APP. 1985) 17, 18
EVANS v. MCKAY, 869 F.2D 1341, 1345 (9TH CIR. 1989) 11
FDIC v. HULSEY, 22 F.3D 1472, 1487 (10TH CIR. 1994) 12
FEDERAL SUGAR REFINING CO. v. UNITED STATE SUGAR EQUALIZATION BD., 268 F. 575, 587 (S.D.N.Y. 1920), AFF'D, 517 F.2D 508 (8TH CIR. 1975) 15
FREDERICK v. U.S., 386 F.2D 481, 488 (5TH CIR. 1967) 12
HAMILTON v. NAKAI, 453 F.2D 152, 158-59 (9TH CIR. 1971) 11
IN RE INNES, 184 F.3D 1275 (10TH CIR. 1999), CERT. DENIED, 529 U.S. 1037 (2000) 13, 14
IN RE MAGNOLIA VENTURE CAPITAL CORP., 218 B.R. 843, 849-50 (S.D. MISS. 1997) 14
JICARILLA APACHE TRIBE v. ANDRUS, 687 F.2D 1324, 1344 (10TH CIR. 1982) 11, 12
KIOWA TRIBE v. MANUFACTURING TECHNOLOGIES, INC., 523 U.S. 751, 754, 760 (1998) 22
MATTEI v. HOPPER, 51 CAL. 2D 119, 122, 330 P.2D 625, 626 (1958) 15
MURRAY v. CITY OF CHARLESTON, 96 U.S. 432, 445 (1878) 20
NAMEKAGON DEV. CO., INC. v. BOIS FORTE RESERVATION HOUSING AUTHORITY, 395 F.SUPP. 23, 27-28 (D. MN. 1974) 13, 15

NATIONAL STATE BANK OF NEWARK v. U.S., 357 F.2D 704, 706 (CT. CL. 1966) 13
OSAGE TRIBAL COUNCIL v. UNITED STATES DEPARTMENT OF LABOR, 187 F.3D 1174, 1181 (10TH CIR. 1999) 13
PAN-AM TOBACCO CORP. v. DEPT. OF CORRECTIONS, 471 SO.2D 4, 5 (FLA. 1984) 18
PARKER v. STATE BOARD OF REGENTS, 724 SO.2D 163, 169 (FLA. CT. APP. 1998) 18
PORTER v. U.S., 496 F.2D 583, 587 (CT. CL. 1974), CERT. DENIED, 420 U.S. 1004 (1975) 13
RAMEY CONSTR. CO. v. APACHE TRIBE OF MESCALERO RESERVATION, 673 F.2D 315, 319-320 (10TH CIR. 1982) 11
SANTA CLARA PUEBLO v. MARTINEZ, 436 U.S. 49, 58 (1977) 17
SEKAQUAPTEWA v. MACDONALD, 619 F.2D 801, 808 (9TH CIR. 1980), CERT. DENIED, 449 U.S. 1010 (1980) ... 11, 12
SMITH v. HOPLAND BAND OF POMO INDIANS, 95 CAL. APP. 4TH 1, 115 CAL. RPTR. 2D 455 (CAL. CT. APP. 2002) ..... PASSIM
SMITH v. STATE, 222 S.E.2D 412, 423 (N.C. 1976)..... 18, 19
SOUTHWEST FOREST INDUSTRIES v. HUPA (HOOPA) TIMBER CORP., 151 CAL. APP. 3D 239 (CAL. CT. APP. 1984)..... 15
SUR PUEBLO, 181 F.3D 676, 680 (5TH CIR. 1999)..... 17
THREE AFFILIATED TRIBES OF FT. BERTHOLD RESERVATION v. WOLD ENGINEERING, 476 U.S. 877, 890 (1986)..... 17
TURNER v. MARTIRE, 82 CAL. APP. 4TH 1042, 1048 (CAL. CT. APP. 2000) 17
UNITED STATES v. UNITED STATES FIDELITY & GUARANTY CO., 309 U.S. 506, 514 (1940) 11
WIECKING v. ALLIED MEDICAL SUPPLY CORP., 391 S.E.2D 258, 261 (VA. 1990)..... 18, 21
WYANDOTTE NATION v. CITY OF KANSAS CITY, 200 F. SUPP. 2D 1279, 1285 (D. KAN. 2002) 11, 12

STATUTES

25 U.S.C. §1302..... 21
28 U.S.C. §1254(1)..... 1

CAL. CIV. CODE § 3545 15

OPINIONS AND ORDERS BELOW

In May 2000, Petitioner Lobo Gaming, Inc. sued Respondents, the Pit River Indian Tribe and the Pit River Gaming Commission ("Tribe"), in the Shasta County Superior Court of California claiming breach of contract and unjust enrichment. The Superior Court granted the Tribe's Motion to Quash Service of Summons and Complaint on the ground that the Tribe enjoyed sovereign immunity that had not been waived in accordance with tribal law, even though there was a waiver of immunity in the Petitioner's contract with the Tribe. Appendix, pp. 15a-16a. The California Court of Appeals, Third Appellate District, affirmed in *Lobo Gaming, Inc. v. Pit River Tribe of California et al.*, No. C037661, 2002 Cal. App. Unpub. LEXIS 894 (Cal. Ct. App. May 7, 2002). Appendix, pp. 1a-14a.

JURISDICTION

On August 14, 2002, the California Supreme Court entered its order denying discretionary review of the court of appeals' decision. Appendix, p. 17a. This petition for review is timely filed pursuant to Sup. Ct. R. 13.1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

1. Article VII §1 of the Pit River Tribal Constitution provides as follows:

> Section 1. Tribal Council. The Tribal Council shall have the following powers:
>
> a. To negotiate, consult and contract with Federal, State and Tribal governments, private enterprises, individuals and other organizations.

* * *

e. To plan and manage all economic affairs and enterprises of the Tribe.

* * *

q. To sue on behalf of the Tribe.

* * *

t. To exercise all powers vested in it by existing law, Tribal traditions and applicable Federal and State law, and such further powers as may be in the future be granted to the Tribal Council by members of the Tribe, the United States or the State of California.

2. Article VII § 3 of the Pit River Tribal Constitution provides as follows:

Section 3. Reserved Powers.

a. To waive the sovereign immunity of the Tribe to unconsented suit; however, no waiver of sovereign immunity shall be made except by a majority of the registered voters voting thereon at a meeting duly called, noticed and convened for that express purpose.

STATEMENT OF THE CASE

This Petition seeks review of important issues of federal law concerning the parameters of tribal sovereign immunity in cases where Indian tribes contract with private businesses. The issues are particularly important in light of the dramatic rise in Indian gaming throughout the United States. This rise has resulted in a simultaneous increase in business

transactions between Indian tribes and the private sector, from large financial institutions to small vendors. The need for uniform law in dealing with the crucial issue of sovereign immunity is important to both private business and the tribes themselves, in order to create a climate of certainty and uniformity and thereby foster economic development where little has previously existed. Such uniform law already exists in the large body of federal case law on sovereign immunity. The Court's resolution of the federal questions presented in this Petition will create a bright line rule to the benefit of future tribal-private sector relations.

In 1996, the Tribe entered into a loan and equipment Lease Agreement ("Agreement") with Petitioner. Under the Agreement, Petitioner loaned the Tribe $800,000 to construct a Class III gaming facility in Burney, California. Petitioner also leased to the Tribe and installed 108 gaming machines in the casino. The Agreement was negotiated, authorized and executed by the Pit River Tribal Council, the Tribe's governing body. The Tribal Council was authorized to negotiate and execute the Agreement pursuant to Article VII §1.a of the Tribal Constitution. The Tribal Council held itself out to Petitioner as having the authority to execute the agreement and be bound by all of its provisions, including the waiver of immunity contained in the Agreement.

By its terms, the Agreement authorized Petitioner to enforce its rights under the Agreement in a court of competent jurisdiction. As part of the inducement to Petitioner to provide the loan and gaming machines, the Tribe expressly agreed to:

> Allow Lessor [Petitioner], for the sole purpose of enforcement of its rights in this agreement, to bring [an] action in a court of competent jurisdiction if Lessor deems

> it necessary to secure its interest. Lessor's remedies will be limited to recovery of its equipment and repayment of the loan referred to above. Tribe agrees to abide by the decision of such court in this matter. Any judgment shall be satisfied only from casino profits and not from any other Tribal assets whatsoever.

The Agreement also recited that it "shall be binding upon and inure to the benefit of the parties and their respective assigns."

Pursuant to the Agreement, Petitioner provided the loan funds and the casino was subsequently constructed and opened in May 1996. Since then, the Tribe has derived a substantial amount of revenue from the gaming machines at the casino. After the casino opened, the Tribe began making lease payments on the machines. However, with the exception of $83,000 in interest payments, the Tribe made no payments on the loan. The Tribe also stopped making lease payments in January 2000, but continued to use and benefit from Petitioner's machines. Since the opening of the casino in May 1996, Petitioner received a total of $1,671,894 in payments from the Tribe, mostly lease payments based on a percentage of revenue from the machines. To date, Petitioner's costs in connection with the Agreement exceed $2 million.

In May 2000, Petitioner sued the Tribe in the Shasta County Superior Court, claiming breach of contract and unjust enrichment. The Superior Court granted the Tribe's Motion to Quash Service of Summons and Complaint on the ground that Petitioner's action was barred by the Tribe's sovereign immunity and that the Tribal Council – although it had the authority to enter into the contract – did not have the authority to waive the Tribe's immunity from a suit on

the contract. Appendix, pp. 15a-16a. To support its ruling, the Superior Court relied on Article VII §3.a of the Tribal Constitution, which provides as follows:

> Section 3. Reserved Powers.
>
> > a. To waive the sovereign immunity of the Tribe to unconsented suit; however, no waiver of sovereign immunity shall be made except by a majority of the registered voters voting thereon at a meeting duly called, noticed and convened for that express purpose.

Petitioner appealed the trial court's decision to the court of appeals in February 2001. After the appellate briefs were filed, the decision in *Smith v. Hopland Band of Pomo Indians*, 95 Cal. App. 4th 1, 115 Cal. Rptr. 2d 455 (Cal. Ct. App. 2002) was issued. Petitioner filed a supplemental case law letter on the *Smith* decision on January 29, 2002. In addition, at oral argument, Petitioner referred extensively to *Smith* and its analysis of the applicability of uniform federal law and the authority of the Tribal Council to waive sovereign immunity. Appendix, p. 9a n. 1. The California Court of Appeals affirmed the trial court's decision, holding that, under tribal law, the Tribal Council lacked the authority to waive the Tribe's sovereign immunity. Appendix, p. 2a. While acknowledging that the Tribal Council had the authority to enter into contracts with private businesses, the court of appeals held that this did not include the authority to waive the Tribe's sovereign immunity from suit on the contract. The court reasoned that under Article VII § 3.a of the Tribal Constitution, only the general membership had the power to waive the Tribe's sovereign immunity. Appendix, p. 13a. The court of appeals rejected Petitioner's argument that the Tribal Council's authority

to contract included, as a necessary incident thereof, the authority to waive sovereign immunity for suits on the contract. *Id.* The court of appeals also rejected Petitioner's argument that the use of the phrase "unconsented suit" in Article VII §3.a of the Tribal Constitution was a tacit recognition of the Tribal Council's authority to consent to a waiver as part of its power to contract. Appendix, pp. 12a-13a. Relying exclusively on tribal law to determine the Tribal Council's authority, the court of appeals implicitly rejected the Petitioner's argument, based on *Smith*, that the issue of tribal sovereign immunity should be decided by applying uniform federal law.

In June 2002, Petitioner sought review before the Supreme Court of California. In its Petition for Review, Petitioner raised the same three federal questions presented in the present Petition. On August 14, 2002, the California Supreme Court entered its order denying discretionary review of the court of appeals' decision. Appendix, p. 17a.

ARGUMENT

The Rules of the United States Supreme Court provide for discretionary review for "compelling reasons." Sup. Ct. R. 10. The "character of the reasons the Court considers" include situations in which :

> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals; [and]
>
> (c) a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Id. The above situations, however, are "neither controlling nor fully measur[e] the Court's discretion." *Id.*

In the present case, the appellate court decision below conflicts with prior decisions of this Court and other federal courts which have resolved questions of federal sovereign immunity according to uniform principles of federal law. The appellate court decision below also diverges from a prior California appellate decision, *Smith v. Hopland Band of Pomo Indians*, 95 Cal. App. 4th 1, 115 Cal. Rptr. 2d 455 (Cal Ct. App. 2002), which properly applied federal law in determining whether a tribe's sovereign immunity had been authoritatively waived. The specific question of whether a tribal governing body has the power to waive tribal sovereign immunity when that body is authorized to execute contracts on the Tribe's behalf is an important federal question that has not been but should be settled by this Court. All of the above present compelling reasons for this Court's review.

I. THE COURT BELOW DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, RESOLVED BY THIS COURT, AND IT DID SO IN A MANNER CONFLICTING WITH THE DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS.

The California court of appeals' decision *Smith v. Hopland Band of Pomo Indians*, 95 Cal. App. 4th 1, 115 Cal. Rptr. 2d 455 (Cal. Ct. App. 2002), addressed a tribal council's authority to waive sovereign immunity in a case where the contract was authorized by the Tribe's governing body. In doing so, *Smith* applied uniform principles of federal law, relying on this Court's recent decision in *C & L Enterprises, Inc. v. Citizen Band Potowatomi Tribe of Oklahoma*, 532 U.S. 411 (2001).

The *Smith* court then held that there was a valid contractual waiver despite the Tribe's claim that the waiver was ineffective under tribal law. The decision to apply uniform federal law in *Smith* is consistent with the fact that federal courts have long resolved general questions of tribal sovereign immunity according to principles of federal, not tribal law.

The issue in *Smith* was whether an arbitration clause contained in an architect agreement between Smith and the Tribe effectuated a valid waiver of the Tribe's immunity from suit on the contract. The court held that, by agreeing to the arbitration clause and to enforcement of an arbitral award "in any court having jurisdiction thereof," the Tribe waived its immunity. *Smith*, 95 Cal. App. 4th at 8, *citing C&L Enterprises, Inc.* As is the case here, the Tribal Council in *Smith* had authorized the agreement as well as the Chairman's signature on the agreement. Significantly, the court in *Smith* rejected the Tribe's argument that the waiver was invalid because it did not comply with the Tribe's sovereign immunity ordinance, which required a separate ordinance or resolution explicitly waiving sovereign immunity. The court began its analysis by stating that the Tribe's argument:

> stands or falls with the proposition that we must apply its tribal sovereign immunity ordinance to find the otherwise binding contract with Smith ineffective to waive sovereign immunity, because the explicit waiver was made by contract, instead of pursuant to a tribal ordinance or resolution. We decline to do so for several reasons.

Smith, 95 Cal. App. 4th at 9.

The second of the several reasons given by the *Smith* court is particularly important in terms of the case at bar:

> [W]e question the premise that the issue whether the Tribe has waived its sovereign immunity by entering into this contract should be determined by reference to a tribal law. Although there are, no doubt, some substantive differences between tribal sovereign immunity and the law applicable to waiver of immunity by foreign sovereigns, the court in *C & L Enterprises, supra*, 532 U.S. 411, 121 S.Ct. 1589-1595, fn. 3 observed that reference to uniform federal law governing the waiver of immunities by foreign sovereigns is appropriate in deciding whether a particular act constitutes a waiver of tribal immunity. Therefore, in reaching its conclusion that the Potawatomi Tribe had waived its sovereign immunity by entering into a contract with the arbitration and choice of law clause, the Court observed that, " '[u]nder the law of the United States ... an agreement to arbitrate is a waiver of immunity ....' Restatement (Third) of the Foreign Relations Law of the United States § 456(2)(b)(ii)(1987)." (*Id.* at p. 1595, fn. 3.) We conclude that, where, as here, the person negotiating and signing the contract is authorized to do so, and the Tribal Council approves the contract, the question whether that act constitutes a waiver is one of federal law. Under federal law, "[w]hen a person has authority to sign an agreement on behalf of a state, it is assumed that the authority

> extends to a waiver of immunity contained in the agreement." (Rest.3d Foreign Relations Law of the United States (1987) § 456, com. B.) As we have explained, although the Tribe couches its argument in terms of whether Sigala [the Chairperson] had actual authority to agree to the contract terms, the declarations establish that, she *did* have this authority, and moreover, that the Tribal Council, fully aware of its terms, approved of the contract by resolution.

Smith, 95 Cal. App. 4th at 10 (emphasis added)(footnote omitted).

Thus, the *Smith* court made two significant rulings. One, that the question of whether tribal immunity has been waived by contract is a question of federal, not tribal law, and two, that under federal law when a person is authorized to sign an agreement on behalf of the tribe, it is assumed that the authority extends to the waiver contained in the agreement. *Id.* The *Smith* court also indicated that uniform federal law should be applied to the question of the Council's or Chairman's authority to enter into an agreement. *Smith*, 95 Cal. App. 4th at 10, n.9, *citing Aquamar v. Del Monte Fresh Produce*, 179 F.3d 1279, 1294 n. 36 (11th Cir. 1999).

In contrast to *Smith*, the court below held that the waiver of immunity contained in Petitioner's agreement with the Tribe was invalid because the Tribal Council lacked the authority to waive sovereign immunity, even though the Council had the constitutional authority to negotiate and execute the contract. In making this determination, the court looked exclusively at tribal law, *i.e.*, Article VII § 3.a of the Tribal Constitution. Had the court applied the same uniform principles of federal law relied on in *Smith*, it

would have reached a different result. This Court should grant review to resolve the inconsistency between *Smith* and the case at bar, and determine both whether the issue of the Tribe's waiver of its immunity by contract should be resolved by the application of uniform federal law and whether the waiver was valid under federal law.

Substantial federal case law establishes that tribal sovereign immunity is "coextensive with the sovereign immunity of the federal government." *Evans v. McKay*, 869 F.2d 1341, 1345 (9th Cir. 1989); *Wyandotte Nation v. City of Kansas City*, 200 F. Supp. 2d 1279, 1285 (D. Kan. 2002); *Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 319-320 (10th Cir. 1982) *citing* various cases including *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 514 (1940); *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1344 (10th Cir. 1982); *Sekaquaptewa v. MacDonald*, 619 F.2d 801, 808 (9th Cir. 1980), *cert. denied*, 449 U.S. 1010 (1980); *Hamilton v. Nakai*, 453 F.2d 152, 158-59 (9th Cir. 1971). The term "coextensive" is defined as "having the same limits, boundaries, or scope." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, 4th Ed. (2000). It therefore makes sense to resolve issues of tribal sovereign immunity by application of uniform federal law rather than looking to the peculiarities of each tribe's local laws, which in many cases are difficult to find.

Because tribal sovereign immunity is coextensive with the immunity of the United States, federal courts have ruled that tribal sovereign immunity is subject to the same general limitations. For example, in *Wyandotte supra*, the federal district court faced the issue of whether the Tribe, by filing a quiet title action, had waived its sovereign immunity as to counterclaims for quiet title and equitable recoupment. The court concluded that, "[b]ecause tribal sovereign immunity is

generally coextensive with that of the United States, tribes may waive sovereign immunity as to claims brought in recoupment against actions brought by the tribe," *Id.* at 1285, *quoting Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1344-45 (10th Cir. 1982). The *Wyandotte* court applied uniform principles of federal law to reach this conclusion. *Id.* at 1285, *citing Jicarilla*, 687 F.2d at 1344; *Frederick v. U.S.*, 386 F.2d 481, 488 (5th Cir. 1967); *FDIC v. Hulsey*, 22 F.3d 1472, 1487 (10th Cir. 1994).

By contrast, the court below relied exclusively on the limitations contained in tribal law to find that the contractual waiver of immunity was invalid. Following the lower court's reasoning, Article VII § 3.a of the Pit River Tribal Constitution would prohibit a counterclaim of the type recognized in *Wyandotte, supra.* In other words, the peculiarities in tribal law would trump the federal limitations on tribal sovereign immunity recognized in *Wyandotte* and cases like it. Under Article VII § 1.q of the Tribal Constitution, the Pit River Tribal Council has the express constitutional power to sue on behalf of the Tribe. Following *Wyandotte* and the cases cited therein, a suit by the Pit River Tribal Council on behalf of the Tribe would automatically waive the Tribe's immunity with respect to a defendant's recoupment counterclaims without the necessity of a tribal General Membership vote under the reserved powers clause of Article VII § 3.a. The lower court's decision conflicts with *Wyandotte* and cases like it that recognize federal law limits on tribal sovereign immunity.

Federal law principles also establish that if an agency or instrumentality of the United States, acting within the scope of its authority, enters into a contract and thereby binds the United States as principal, the federal government is considered to have waived its sovereign immunity from suit on the contract. *See e.g.*,

Porter v. U.S., 496 F.2d 583, 587 (Ct. Cl. 1974), *cert. denied*, 420 U.S. 1004 (1975), *citing National State Bank of Newark v. U.S.*, 357 F.2d 704, 706 (Ct. Cl. 1966). Federal courts have also found that the power of a tribe's governing body to waive sovereign immunity may be inherent within another enumerated power bestowed upon the governing body, such as the power to contract. *See e.g., Namekagon Dev. Co., Inc. v. Bois Forte Reservation Housing Authority*, 395 F.Supp. 23, 27-28 (D. Mn. 1974)(finding that the Tribal Council's power to waive a tribal corporation's sovereign immunity was inherent in its power to establish the corporation, and rejecting the argument that the power to waive sovereign immunity was reserved to the Tribal membership), *aff'd*, 517 F.2d 508 (8th Cir. 1975). The Court should grant *certiorari* to resolve the conflict between the lower court's analysis and the foregoing cases, and determine whether the foregoing principles should be applied in the context of this case, where the Tribal Council agreed to waive the Tribe's immunity in a contract that the Council was authorized to execute.

The decision below in this case is also inconsistent with federal law principles governing the waiver of a state's Eleventh Amendment immunity.[1] For example, in *In re Innes*, 184 F.3d 1275 (10th Cir. 1999), *cert. denied*, 529 U.S. 1037 (2000), the Tenth Circuit reviewed Kansas enabling legislation which authorized a state university to contract with third parties. At issue was the validity of an immunity waiver contained in a

---

[1] Although tribal sovereign immunity may not be precisely congruent with that of states, similar principles have been applied to both. *See e.g., Osage Tribal Council v. United States Department of Labor*, 187 F.3d 1174, 1181 (10th Cir. 1999)(while explicitly conceding differences between state and tribal immunity, court "takes . . . cue from the decisions addressing waivers of Eleventh Amendment state sovereign immunity" in ruling on issue of whether tribal immunity was waived), *cert. denied*, 530 U.S. 1229 (2000).

contract entered into by the university. The court rejected the argument that the university lacked the authority to waive the State's immunity:

> Nothing in the statute itself makes entering into a contract waiving immunity an *ultra vires* act. Indeed the contrary is true – this legislation explicitly gives KSU, as a state education institution, expansive unlimited authority to contract with the DOE so that KSU may participate in student financial assistance programs. Further, unlike in other Kansas statutes, there is no provision in [the statute] disclaiming a waiver or prohibiting consent to waive . . . . Accordingly, we hold that [the enabling statute] conferred upon KSU the power to waive Eleventh Amendment immunity.

In re Innes, 184 F.2d at 1284 (emphasis added); *accord*, *In re Magnolia Venture Capital Corp.*, 218 B.R. 843, 849-50 (S.D. Miss. 1997).

The question of whether an Indian tribe's legislative body, in this case the Pit River Tribal Council, has the authority to waive tribal sovereign immunity in cases where it has the authority to contract, has never been addressed by this Court. There are, nevertheless, analogous federal Indian law cases which support the proposition that a tribal council's authority to enter into contracts includes the authorization to waive sovereign immunity. Specifically, one federal court has ruled that "'it is repugnant to the American theory of sovereignty that an instrument of the sovereign shall have all the advantages of a trading corporation, and the ability to sue, and yet be itself immune from suit, and able to contract with others, or to injure others, confident that no redress may be had against it as a matter of right.'"

Namekagon Development Co., Inc., supra, 395 F. Supp. at 29, *citing Federal Sugar Refining Co. v. United State Sugar Equalization Bd.*, 268 F. 575, 587 (S.D.N.Y. 1920), *aff'd*, 517 F.2d 508 (8th Cir. 1975); *accord, Southwest Forest Industries v. Hupa (Hoopa) Timber Corp.*, 151 Cal. App. 3d 239 (Cal. Ct. App. 1984).[2]

The reasoning above should apply to the facts of this case: nothing in the Pit River Tribal Constitution makes the Tribal Council's entering a contract waiving immunity an *ultra vires* act and the Tribal Constitution gives the Tribal Council express authority "to contract with Federal, State and Tribal governments, private enterprises, individuals and other organizations." Article VII § 1.a. In order for this authority to be meaningful, the power of the Tribal Council to contract must necessarily include the power to agree to binding and enforceable remedies, including a limited waiver of sovereign immunity to allow the other party to obtain relief for breach of contract. Otherwise, there is no mutuality of obligation, and the Tribal Council's authority to contract becomes illusory. *See e.g., Mattei v. Hopper*, 51 Cal. 2d 119, 122, 330 P.2d 625, 626 (1958)("Without . . . mutuality of obligation, [an] agreement lacks consideration and no enforceable contract has been created. . . . [o]r, if one of the promises leaves a party free to perform or to withdraw from the agreement at his own unrestricted pleasure, the promise is deemed illusory and it provides no consideration.") In order to be meaningful, and under the general presumption that contracts are "fair and regular," (*see* Cal. Civ. Code § 3545), the Tribal Council's express power to enter into contracts would necessarily require not only an intent that valid contracts be entered

---

[2] *Southwest Forest Industries* is an unpublished case that is not citable as precedent in California courts. The court addressed the issue of tribal sovereign immunity in a context analogous to the present case and consistent with Petitioner's position.

into, but that the contract is one that can be enforced so as to create mutuality of obligation and give the other party the benefit of its bargain. In other words, if the Tribal Council has the constitutional authority to enter into contracts and manage the economic affairs of the Tribe, then it must necessarily include, as a matter of law, the authority to agree to enforceable remedies contained within the contract in order to allow the other party meaningful redress in the event of its breach.

The appellate court's failure to recognize and apply uniform federal law principles impermissibly extends the scope of an Indian tribe's sovereign immunity past that of the United States. This Court should grant the Petition to consider the important question of whether to adopt a uniform federal rule that, where a tribe's governing body is authorized to enter into contracts, that authority includes the authority to waive the tribe's sovereign immunity.

II. THIS COURT SHOULD GRANT THE PETITION TO DETERMINE THAT, AS A MATTER OF FEDERAL LAW, A TRIBAL GOVERNING BODY THAT IS EXPRESSLY AUTHORIZED TO EXECUTE A CONTRACT, ALSO HAS THE POWER TO WAIVE THE TRIBE'S SOVEREIGN IMMUNITY IN THE CONTRACT.

This Court has never previously addressed the specific question of whether a tribal governing body – such as the Pit River Tribal Council – has the power to waive tribal sovereign immunity when that body is authorized to execute contracts on the tribe's behalf. The question is an important federal question and needs a uniform answer. This Court should adopt a bright line rule requiring the application of uniform federal law principles to resolve issues of tribal sovereign immunity. This Court should also adopt a bright line rule that, as a

matter of federal law, when a tribal governing body has the express authority to execute a contract, it also has the power to waive the tribe's sovereign immunity from a suit on that contract.

This Court has recognized that the doctrine of tribal sovereign immunity is grounded in the common law. *See e.g., Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 890 (1986) ("The common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance."); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1977)(court describes tribal immunity as "the common-law immunity from suit traditionally enjoyed by sovereign powers"); *see also, Turner v. Martire*, 82 Cal. App. 4th 1042, 1048 (Cal. Ct. App. 2000)(" Tribal immunity emanates from the common law"); *TTEA v. Isleta del Sur Pueblo*, 181 F.3d 676, 680 (5th Cir. 1999)(court outlines parameters of the "federal common law doctrine of tribal sovereign immunity.") A rule requiring a tribal governing body to be bound by its waiver of immunity in a contract that it is authorized to execute would be firmly grounded in the common law requirements for fairness, mutuality of obligation in contracting, and due process.

In contexts analogous to the present case, courts have repeatedly emphasized such requirements. For example, in *Dade County v. American Re-Insurance Co.*, 467 So.2d 414 (Fla. Dist. Ct. App. 1985), the court rejected an argument similar to one adopted by the court of appeals in this case, holding that where the county was authorized by law to enter into an indemnity insurance contract, it could not assert sovereign immunity in an action brought under the contract. In equating a legislative body's power to contract with the power to waive the government's sovereign immunity from suit on the contract, the court reasoned:

> Under basic hornbook law, in order to be valid, a contract must be mutually enforceable. In accord with this principle, the [Florida] Supreme Court has recently held that sovereign immunity is not a valid defense to a breach of contract action brought against the state where the state has legal authority to enter the contract. Accordingly, the defense of sovereign immunity will not protect [Dade County] from American's counterclaim for Dade's breach of the insurance contract.

Dade, 467 So.2d at 418, *citing Pan-Am Tobacco Corp. v. Dept. of Corrections*, 471 So.2d 4, 5 (Fla. 1984); *accord*, *Parker v. State Board of Regents*, 724 So.2d 163, 169 (Fla. Ct. App. 1998).

Other state courts are in agreement. *See e.g.*, *Wiecking v. Allied Medical Supply Corp.*, 391 S.E.2d 258, 261 (Va. 1990)("the doctrine of sovereign immunity has no application in actions based upon valid contracts entered into by duly authorized agents of the government"); *Architectural Woods, Inc. v. Washington*, 598 P.2d 1372, 1375 (Wash. 1979)(by the act of entering into a contract which the government is authorized to make, the government cannot thereafter assert sovereign immunity as a defense to an action for its breach); *Smith v. State*, 222 S.E.2d 412, 423 (N.C. 1976)(because employee's suit was predicated upon a contract fully authorized by the legislature, the State consented to be sued for breach of the contract); *Ace Flying Service, Inc. v. Colorado Dept. of Agriculture*, 314 P.2d 278, 280 (Colo. 1957)(when a state enters into authorized contractual relations, it cannot later claim sovereign immunity in a suit for its breach).

In *Smith v. State, supra*, the court looked explicitly to the following common law requirements for equity, fairness and due process:

> To deny the party who has performed his obligation under a contract the right to sue the state when it defaults is to take his property without compensation and thus to deny him due process; . . . To hold that the state may arbitrarily avoid its obligation under a contract after having induced the other party to change his position or to expend time and money in the performance of his obligations, or in preparing to perform them, would be judicial sanction of the highest type of governmental tyranny; . . . To attribute to the General Assembly the intent to retain to the state the right . . . to breach its obligation at the expense of its citizens imputes to that body "bad faith and shoddiness" foreign to a democratic government; . . . . A citizen's petition to the legislature for relief from the state's breach of contract is an unsatisfactory and frequently a totally inadequate remedy for an injured party; and . . . The courts are a proper forum in which claims against the state may be presented and decided upon known principles.

Smith v. State, 222 S.E.2d at 423.

In this case, the appellate court's interpretation of the Pit River Tribal Constitution failed to give the Tribal Council authority to agree to appropriate and enforceable remedies when it contracts and is therefore contrary to these common law requirements for fairness, mutuality of obligation in contracting, and due

process of law. This Court spoke decisively to the issue in *Murray v. City of Charleston*, 96 U.S. 432, 445 (1878):

> The truth is, States and cities, when they borrow money and contract to repay it with interest, are not acting as sovereignties. They come down to the level of ordinary individuals. Their contracts have the same meaning as that of similar contracts between private persons. Hence, instead of there being in the undertaking of a State or city to pay, a reservation of a sovereign right to withhold payment, the contract should be regarded as an assurance that such a right will not be exercised. A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity.

(emphasis added).

This common law reasoning was subsequently summarized by the Supreme Court of Virginia in a concise analysis of the various cases addressing the issue:

> [W]hen the state contracts for goods or services, receives the benefit of the contract, and then refuses to honor its obligations, the contractor's property is subjected to an unconstitutional taking without just compensation; a denial of liability under such circumstances also violates state and federal due-process guarantees; to hold that the state may enter into a valid contract and yet retain the power to avoid its obligation would entail an obvious contradiction; neither the state nor the contractor can be bound,

> yet not bound, by a single contract, the courts will not attribute to the legislature any intention to permit the government to exercise bad faith and shoddy dealing, and relegating the injured party to an appeal for justice to the legislature in the form of a private bill for relief is to offer a doubtful remedy,
>
> . . .
>
> The reasoning of the foregoing cases is virtually undisputed among the authorities which have considered the immunity question, and we find it persuasive.

Wiecking, *supra*, 391 S.E.2d at 260 (citations and quotations omitted).[3]

Of course, Petitioner recognizes the principle enunciated by this Court, that, as sovereign governmental entities, Indian tribes enjoy sovereign immunity from suits on contracts except where Congress has authorized the suit or the tribe has clearly waived its immunity, whether the contracts involve governmental or commercial activities, and whether the contracts were made on or off a reservation. This principle was made clear in *Kiowa Tribe v.*

---

[3] Like all federally recognized Indian tribes, the Pit River Tribe is bound by the Indian Civil Rights Act, 25 U.S.C. § 1302, including the provisions therein prohibiting the Tribe from taking a person's property without just compensation and depriving a person of property without due process of law. The Tribe's obligations under the Indian Civil Rights Act are incorporated in Article IV of the Tribal Constitution. The argument that the Tribal Council, though admittedly possessing the authority to enter into contracts, has no authority to authorize remedies for its breach in the form of a contractual waiver of immunity, is contrary to the Act's takings clause and due process clause, 25 U.S.C. §1302(5) and (8), as the court recognized in *Wiecking*.

Manufacturing Technologies, Inc., 523 U.S. 751, 754, 760 (1998). However, Petitioner has never argued below – and does not argue now – that a tribe waives sovereign immunity merely by entering a contract. The contract at issue in *Kiowa* did not contain a waiver of tribal sovereign immunity. By contrast, the Agreement in this case contains a clear contractual waiver of the Tribe's immunity.[4] *See* Statement of the Case *supra*. Thus, the question presented to this Court is a narrower one than the one presented in *Kiowa*: Does the Tribal Council's authority to enter into contracts inherently include the authority to waive sovereign immunity from a suit on the contract? If the answer to that question is yes, then the waiver of immunity contained in Petitioner's contract with the Tribe is valid. The reasoning of the cases cited above is applicable to the facts of this case because the cases support one basic principle: a governing body's constitutional power to contract must necessarily include the power to waive its immunity from a suit on the contract. While the *Smith* court and other courts have recognized this principle, the court below in the case at bar did not.

---

[4] This Court set forth the requisite standard for waivers of tribal sovereign immunity in *C&L Enterprises, Inc.*, 532 U.S. at 418 ("to relinquish its immunity, a tribe's waiver must be 'clear'").

CONCLUSION

WHEREFORE, for all of the foregoing reasons, Petitioner, Lobo Gaming, Inc., requests that this Court GRANT its Petition for a Writ of Certiorari.

Respectfully submitted this 12th day of November, 2002.

John Fredericks III
Fredericks, Pelcyger & Hester, LLC
1075 South Boulder Road, Suite 305
Louisville, CO 80027
TEL: (303) 673-9600
FAX: (303) 673-9155
COUNSEL FOR PETITIONER

C037661

COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT

LOBO GAMING, INC., Plaintiff and Appellant,

v.

PIT RIVER TRIBE OF CALIFORNIA et al., Defendants and Respondents.

May 7, 2002, Filed

NOTICE:
[*1] NOT TO BE PUBLISHED CALIFORNIA RULES OF COURT, RULE 977(a), PROHIBITS COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 977(B). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR PURPOSES OF RULE 977.

JUDGES:
RAYE, J. We concur: DAVIS, Acting P.J., MORRISON, J.

OPINIONBY:
RAYE

OPINION:

Indian tribes enjoy sovereign immunity "from suits on contracts, whether those contracts involve governmental or commercial activities and whether they

were made on or off a reservation." (*Kiowa Tribe v. Manufacturing Tech. (1998) 523 U.S. 751, 760 [140 L. Ed. 2d 981, 988, 118 S. Ct. 1700]* (*Kiowa*).) In this appeal challenging the contours and implications of sovereign immunity, plaintiff Lobo Gaming, Inc. contends the Pit River Tribe of California (Tribe) contractually waived its immunity. We disagree. The Constitution of the Pit River Tribe (Tribal Constitution) and state and federal precedent support the Tribe's notion that the Pit River Tribal Council (Tribal Council) did not have the authority to waive immunity without the consent of the tribal **[*2]** membership and such authority is not implicit in the Tribal Council's power to contract. We, therefore, affirm the order granting the Tribe's motion to quash the service of summons.

FACTS

Pursuant to an equipment lease agreement executed in March 1996, the Tribal Council borrowed funds from Lobo Gaming to construct two casinos on its reservation in Shasta County and to lease gaming machines and furnishings. The Tribe is governed by the Tribal Constitution. Article VII, section 1 confers on the Tribal Council the power to "negotiate, consult and contract with Federal, State and Tribal governments, private enterprises, individuals and other organizations." (Tribal Constitution, Art. VII, § 1.)

The Tribal Constitution expressly reserves to the Tribe the power to waive sovereign immunity. Article VII, section 3, entitled "Reserved Powers," states in pertinent part: "To waive the sovereign immunity of the Tribe to unconsented suit; however, no waiver of sovereign immunity shall be made except by a majority of the registered voters voting thereon at a meeting duly called, noticed and convened for that express purpose."

Nevertheless, the equipment lease purports to waive the [*3] Tribe's sovereign immunity. It states that the Tribe will "allow Lessor, for the sole purpose of enforcement of its rights in this agreement, to bring action in a court of competent jurisdiction if Lessor deems it necessary to secure its interest. Lessor's remedies will be limited to recovery of its equipment and repayment of the loan referred to above. Tribe agrees to abide by the decision of such court in this matter. Any judgment shall be satisfied only from casino profits and not from any other Tribal assets whatsoever." The Tribal Council approved the agreement, but the tribal membership did not. It is undisputed that the registered voters of the Tribe never voted on, and never approved, the agreement, nor did they vote on or approve any proposal for the Tribe to waive its sovereign immunity.

Disagreements developed between the parties over the terms of their agreement. On May 8, 2000, Lobo Gaming sued in Shasta County Superior Court. The Tribe, which had previously filed a federal action challenging the validity of the agreement under section 81 of title 25 of the United States Code, removed the case to federal district court. The district court subsequently granted summary [*4] judgment in favor of Lobo Gaming on the Tribe's federal action and remanded the present case to Shasta County Superior Court without addressing the issues raised therein. On remand, the Tribe moved to quash service of summons on grounds of sovereign immunity. The trial court granted the motion and this appeal followed.

DISCUSSION

No one disputes that the Tribe enjoys sovereign immunity. We need not, therefore, reiterate the basic principles of sovereign immunity, other than to

emphasize there are far- reaching implications of the doctrine for those who choose to do business with Indian tribes. (*Kiowa, supra,* 523 U.S. at p. 754-755; *Santa Clara Pueblo v. Martinez (1978) 436 U.S. 49, 58 [56 L. Ed. 2d 106, 115, 98 S. Ct. 1670]; Puyallup Tribe v. Washington Game Department (1977) 433 U.S. 165, 172-173 [53 L. Ed. 2d 667, 674, 97 S. Ct. 2616]* (*Puyallup*); *Oklahoma Tax Com. v. Potawatomi Tribe (1991) 498 U.S. 505, 509-510 [112 L. Ed. 2d 1112, 1119-1120, 111 S. Ct. 905]* (*Oklahoma Tax Com.*).) In bringing the motion to quash service, the Tribe contends the trial court lacks subject matter jurisdiction because **[*5]** of the Tribe's sovereign immunity. Lobo Gaming insists the Tribe contractually waived its immunity. To relinquish its immunity, a tribe's waiver must be "'clear.'" (*C & L Enterprises v. Citizen Band (2001) 532 U.S. 411, 418 [149 L. Ed. 2d 623, 631, 121 S. Ct. 1589]* (*C & L Enterprises*).)

Both sides seem to agree that to be "clear," a relinquishment must be express. But while the Tribe claims the Tribal Council has no "express" constitutional authority to waive immunity, Lobo Gaming insists the authority to waive immunity is part of its "express" power to contract. The authority to contract, Lobo Gaming argues, is a nullity without the authority to provide enforceable remedies. In the battle over what is express and what is implied, we must construe the language of the Tribal Constitution and resist the seductive temptation to consider either the equities or the expectations of the parties. We reject any implication by the Tribe that we, as a state court, cannot interpret a tribal Constitution. (See, e.g., *Hydrothermal Energy Corp. v. Fort Bidwell Indian Community Council (1985) 170 Cal. App. 3d 489, 216 Cal. Rptr. 59* (*Hydrothermal*).)

The [*6] Tribe provides a plethora of cases involving the application of sovereign immunity to contractual disputes. We find two cases particularly compelling because of the factual similarities. In *World Touch Gaming v. Massena Management, LLC (N.D.N.Y. 2000) 117 F. Supp. 2d 271* (*World Touch Gaming*), the tribe delegated authority to operate its casino to a management company pursuant to a management agreement. The agreement gave the management company the authority to "construct, manage, administer, operate, maintain and improve the gaming facilities ... [and] such other activities as are reasonably related thereto." (*Id. at p. 273, fn. 2.)* The senior vice president of the management company signed the lease and sales agreements as the managing agent of the casino. The sales agreement provided: "Notwithstanding the aforementioned Tribal Sovereignty the Tribe agrees to submit to the jurisdiction of the state and federal courts for the sole and limited purpose of enforcement of the obligations under this contract ...." (*Id. at p. 273.)*

World Touch Gaming, like Lobo Gaming, asserted that the explicit language in the agreement waived [*7] the tribe's sovereign immunity insofar as the breach of contract claim was concerned. The court disagreed. "According to the unequivocal language of the Tribe's Constitution and Civil Judicial Code, only the Tribal Council can waive the Tribe's sovereign immunity, and such waiver must be express. The Tribal Council did not authorize [the senior vice president] to waive sovereign immunity, nor did the Tribal Council expressly waive the Tribe's sovereign immunity. [Citation.] Thus, the Tribe's sovereign immunity was not waived, and it is immune from suit." (*World Touch Gaming, supra*, 117 F. Supp. 2d at p. 275.) The court rejected World Touch's contention that the provision in the management agreement giving exclusive control over the day-to-day

operations of the casino was an authorization to waive the tribe's sovereign immunity.

Danka Funding Co. v. Sky City Casino (1999) 329 N.J. Super. 357, 747 A.2d 837 (*Danka Funding*) also involves a casino on an Indian reservation. Danka Funding entered into two lease agreements with the Pueblo of Acoma, a federally recognized Indian tribe. The lease form contained a so-called "forum selection clause," whereby the **[*8]** tribe consented to the jurisdiction of "any local, state or federal court" and the application of the law of the state in which the lease processing center is located. (*Id.* at p. 840.) The comptroller of the casino signed the agreements on behalf of the tribe. The tribe, as here, contended that the comptroller did not have authority under tribal law to waive immunity. (*Id.* at p. 841.)

In *Danka Funding, supra, 747 A.2d 837,* the tribe's laws protected its sovereign immunity to the maximum extent possible and explicitly stated what procedures had to be followed in order to waive immunity. (*Id.* at pp. 841-842.) Unlike the Tribal Council here, the Acoma Pueblo Tribal Council "has the power to waive the sovereign immunity of the Pueblo of ACOMA or by resolution, to authorize the Governor or his designate to waive the sovereign immunity of the Pueblo of ACOMA as limited in the resolution." (*Ibid.*) But the comptroller, not the council, purportedly waived the tribe's immunity by executing the lease form containing the forum selection clause. Such a waiver, according to the appellate court, was ineffective.

The court concluded: "The requirement that the **[*9]** waiver be 'clear' and 'unequivocally expressed' is not something that may be flexibly applied or even disregarded based on the parties or the specific facts involved. *Ute Distribution Corp. v. Ute Indian Tribe, 149 F.3d 1260, 1267 (10th Cir. 1998).* 'In the absence

of a clearly expressed waiver by either the tribe or Congress, the Supreme Court has refused to find a waiver of tribal immunity based on policy concerns, perceived inequities arising from the assertion of immunity, or the unique context of a case.' *Ute Distribution Corp., 149 F.3d at 1267.*" (*Danka Funding, supra*, 747 A.2d at p. 841.)

Hence, in both *World Touch Gaming* and *Danka Funding*, the business enterprises were unable to pursue their breach of contract claims against the tribes. The courts did not have subject matter jurisdiction because those who purported to waive the tribes' immunity were without authority under the Constitutions and laws of the tribes. In each case, the court warned the sophisticated defendants of the implications of their carelessness. In *World Touch Gaming*, the court concluded: "Moreover, as a sophisticated distributor of gaming equipment **[*10]** that frequently deals with Indian gaming enterprises, World Touch should have beer. careful to assure that either the Management Company had the express authority of the Tribe to waive sovereign immunity, or that the Tribe itself expressly waived sovereign immunity with respect to the Sales and Lease Agreements. [Fn. omitted.] World Touch is not a novice in matters relating to Indian gaming enterprises and Indian sovereign immunity, and cannot now rely upon naivete to expand the reading of the Management Agreement to encompass authority to waive sovereign immunity." (*World Touch Gaming, supra*, 117 F. Supp. 2d at pp. 275-276.)

In *Danka Funding*, the court echoed the same admonishment: "Danka Business Services knew it was dealing with an Indian tribe and is charged with knowledge that the tribe possessed sovereign immunity. The tribe, through its laws, describes how one may

obtain a legally enforceable waiver of that immunity. Neither Danka Business Services nor Danka Funding took advantage of those provisions." (*Danka Funding, supra*, 747 A.2d at p. 842.)

A steady stream of Supreme Court cases on the sanctity of an Indian tribe's sovereign immunity, supplemented **[*11]** by cases such as these in which sovereign immunity is not waived when the means and procedures contravene the tribes' own laws, supports the Tribe's assertion that it had not legally waived its immunity. Lobo Gaming's plea for equitable relief is unavailing. It, too, is a gaming company, presumably sophisticated, and charged with the knowledge that the Tribe possesses sovereign immunity.

But Lobo Gaming insists that a more recent Supreme Court case, *C & L Enterprises*, *supra*, 532 U.S. 411, provides a more favorable standard for the resolution of business disputes with Indian tribes. While *C & L Enterprises* certainly upheld the validity of a tribe's agreement to arbitrate, and hence bodes well for alternative dispute resolution mechanisms if properly authorized and executed, it has no bearing on a case such as this, where the purported waiver contravened the Tribe's Constitution. There was no contention that the form contract, which was proposed by the tribe itself, was not authorized, nor was there any suggestion or hint that whoever approved and executed the agreement did so improperly. Quite simply, the dispositive question raised in this case, whether the power to contract **[*12]** includes the power to waive immunity, was not at issue in *C & L Enterprises*, and the holding, therefore, bears no relevance to the case at hand. **n1**

n1 Similarly, *Smith v. Hopland Band of Pomo Indians (2002) 95 Cal.App.4th 1* (*Smith*), cited at oral argument by counsel for Lobo Gaming as a case expanding the holding of *C & L Enterprises*, is also inapposite. In *Smith*, the court held sovereign immunity was waived by execution of a contract containing an arbitration clause that expressly provided for judicial enforcement. The contract had been approved by the Hopland tribal council. However, the Hopland tribal council, unlike the Tribal Council here, had authority to waive the tribe's sovereign immunity. The case does not support the broad proposition asserted by Lobo Gaming that the power to contract includes the power to waive sovereign immunity.

The Tribe relies on applicable California case law as well. In *Hydrothermal, supra, 170 Cal. App. 3d 489,* **[*13]** the Court of Appeal reversed the confirmation of an arbitration award against the Fort Bidwell Indian Community Council because the tribe had not waived its sovereign immunity. The chairperson of the tribal council, who was also the chief executive officer, purportedly waived immunity by accepting the jurisdiction of an arbitrator. As in *World Touch Gaming* and *Danka Funding*, the court found the waiver had not been authorized by tribal law. Ignoring the equities involved, the court concluded the state lacked subject matter jurisdiction.

Lobo Gaming contends that these cases do not apply. According to Lobo Gaming, in *World Touch Gaming*, *Danka Funding*, and *Hydrothermal*, a mere official of each tribe attempted to waive immunity, but in each case that official had no authority to execute a waiver on behalf of the tribe. In this case, Lobo Gaming argues, the Tribal Council, not an official, executed a contract,

an act it was expressly empowered to perform under tribal law. Since the Tribal Council has the constitutional authority to enter contracts and to manage the economic affairs of the Tribe, unlike the officials in these cases, it had the authority to agree to enforceable **[*14]** remedies contained within the contract. We disagree.

The significance of *World Touch Gaming*, *Danka Funding*, and *Hydrothermal* was not who waived tribal immunity, but whether the waiver was authorized by tribal law. In each case, the court found the waiver had not been executed by those with the constitutional power to act on behalf of the tribe. The same is true here. The language used to reserve the power to waive sovereign immunity to the tribal membership is clear and unequivocal. The Tribal Council was not constitutionally authorized to waive immunity. Hence, *World Touch Gaming*, *Danka Funding*, and *Hydrothermal* are precisely on point. A waiver, no matter how clearly and unequivocally expressed, is ineffective if it transgresses tribal law.

Lobo Gaming resorts to hyperbole, insisting that a failure to find the power to waive immunity implicit in the power to contract will dampen, if not destroy, business opportunities on Indian reservations. No one, according to Lobo Gaming, will contract with a tribe without enforceable remedies. With such dire consequences looming, Lobo Gaming maintains that the only reasonable interpretation of the Tribal Constitution **[*15]** is to conclude that the power to contract means the power to waive sovereign immunity. And that power resides with the Tribal Council.

We, of course, are not the chamber of commerce. Our role is not to supplant the Tribe's assessment of its business risks and opportunities with our own. Our role is more humble and straightforward. We must construe

the express language of the Tribal Constitution with the aid of state and federal law protecting the sovereignty of federally recognized Indian tribes.

Nor are we persuaded that the Tribal Council's inability to waive immunity renders its power to contract a nullity. In *Oklahoma Tax Com., supra, 498 U.S. 505*, the Supreme Court held that the tribe's sovereign immunity precluded the State of Oklahoma from collecting cigarette sales tax from tribal members who purchased their cigarettes in a tribal store on land held in trust by the federal government for the tribe. The court rejected the state's argument, similar to the argument advanced by Lobo Gaming, that they had the right to collect from nonmembers without any remedy. Rather, the court stated, Oklahoma had a variety of alternative remedies, and if those failed, it **[*16]** could pursue appropriate legislation from Congress. (*Id. at p. 514.)*

The Tribe suggests that Lobo Gaming also has alternative remedies, even if they are not as desirable as litigation. The Tribe suggests that the general membership's retained power to waive sovereign immunity does not preclude the Tribal Council from contractually agreeing to other remedies that do not involve an immunity waiver, such as authorizing prospective injunctive relief against tribal officials, escrowing tribal collateral, nonbinding arbitration, or mediation. Again, we need not assess the relative value of the remedies. The question posed is whether the inability to sue in the absence of a waiver of immunity by the tribal membership renders our interpretation of the Tribal Constitution absurd or unreasonable. We conclude it does not. While the possibility of other remedies, like the court alluded to in *Oklahoma Tax Com., supra*, 498 U.S. 505, does mean the power to contract is not a nullity without the power to sue, we are

more persuaded by the clarity of the express language used in the Tribal Constitution to reserve the power to waive immunity to the tribal membership. Given the [*17] strong tradition in state and federal law to honor a tribe's prescription of how immunity must be waived, we find that the Tribal Constitution's clear reservation of the power to waive trumps any collateral restriction on the power to contract. **n2**

> **n2** The parties exchange factual allegations on the merits of the underlying dispute. These allegations are irrelevant to the legal issue presented.

Undeterred by the formidable law against it, Lobo Gaming turns our attention to a single word, convinced that a sole adjective is the key to harmonizing the Tribal Constitution, rendering the waiver effective, and conferring jurisdiction on the courts of California. The adjective is "unconsented"; the context is the Tribe's reservation of the right to waive sovereign immunity to "unconsented suit."

Lobo Gaming argues that the phrase "unconsented suit" in article VII, section 3 of the Tribal Constitution recognizes that the power of the Tribal Council to enter into contracts pursuant to article VII, section [*18] 1 includes the authority to provide for enforceable remedies in the event of a breach of contract. In other words, "unconsented suit" is a lawsuit not consented to by the Tribal Council by contract pursuant to its power under article VII, section 1. Lobo Gaming insists that we must construe each and every term used in the Tribal Constitution, and by interpreting "unconsented" to mean those suits in which the Tribal Council has not

contractually agreed to waive immunity, section 1 and section 3 can be harmonized.

The Tribe's response is twofold. First, "unconsented" routinely modifies "suit" to underscore the self-evident notion that immunity is only pertinent where the sovereign does not consent to being sued. Second, and more importantly according to the Tribe, reliance on this lone adjective does not overcome the absence of any express language in the Tribal Constitution vesting the Tribal Council with the power to waive immunity. In order for "unconsented suit" to mean "unless the Tribal Council contractually agreed to be sued," there would have to be language somewhere in the Tribal Constitution vesting the Tribal Council with the power to waive the Tribe's sovereign immunity. **[*19]** We agree with the Tribe.

The Tribal Constitution expressly reserves the power to waive immunity to the tribal membership. Although the Tribal Constitution confers a long list of powers on the Tribal Council, nowhere does it give the Tribal Council the authority to waive sovereign immunity. To suggest, as Lobo Gaming does, that the power to waive sovereign immunity is "a part of" the power to contract is to conjure a power out of thin air.

And hence, Lobo Gaming's argument comes full circle. Waivers of sovereign immunity cannot be implied, nor can the power to waive immunity. We cannot accept Lobo Gaming's far- fetched notion that under the guise of harmonizing every term the express reservation of the power to waive immunity to the tribal membership gives way to an implied power to waive immunity to the Tribal Council.

Finally, and briefly, we reject Lobo Gaming's contention that if all contractual remedies fail, it is entitled to an equitable estoppel. Sovereign immunity is

a question of jurisdiction, not equity. (*Puyallup, supra*, 433 U.S. at pp. 172-173.) "Sovereign immunity is not a discretionary doctrine that may be applied as a remedy depending upon the equities of **[*20]** a given situation." (*Chemehuevi Ind. Tribe v. Cal. St. Bd. of Equal. (9th Cir. 1985) 757 F.2d 1047, 1052-1053, fn. 6,* revd. in part on other grounds *(1985) 474 U.S. 9.)* Thus, tribal immunity may not be defeated even where its assertion may "unfairly deprive contracting parties of the benefit of their bargains." (*Amer. Indian Agr. Credit v. Stand. Rock Sioux Tribe (8th Cir. 1985) 780 F.2d 1374, 1379.)*

DISPOSITION

The order is affirmed.

RAYE, J.

We concur:

DAVIS, Acting P.J.

MORRISON, J.

140106

SUPERIOR COURT OF THE STATE OF CALIFORNIA SHASTA COUNTY

LOBO GAMING, INC., a New Mexico Corporation, Plaintiff,

v.

PIT RIVER TRIBE OF CALIFORNIA, a federally recognized Indian Tribe and PIT RIVER GAMING COMMISSION, an agency of the Pit River Tribe, Defendants

January 26, 2001, Filed

This matter came on regularly for hearing on the motion of specially appearing defendants to quash service of summons for lack of jurisdiction pursuant to Code of Civil Procedure section 418.10(a)(1). After consideration of the briefs and all other matters presented to the Court, the Court orders as follows:

It is hereby ordered that all requests for judicial notice are granted, except plaintiff's request as to the unpublished decision, which is denied.

It is further ordered that specially appearing defendants are entitled to sovereign immunity in matters of commerce including contracting .Defendant Tribe's Constitution, Art. Sec 1, confers on the Tribal council power to contract, but Art VII, Sec. 3a reserves to the Tribe power "...to waive sovereign immunity of the Tribe to unconsented suite." Plaintiff has failed to establish that the tribe waived its immunity, and has

therefore failed to establish this Court has jurisdiction over the defendants. The motion to quash is GRANTED.

S107517

IN THE SUPREME COURT OF CALIFORNIA,

En banc

LOBO GAMING, INC.,
Plaintiff and Appellant,

v.

PIT RIVER TRIBE OF CALIFORNIA et al.,
Defendants and Respondents.

August 14, 2002, Filed

Petition for review denied.

Supreme Court U.S.
FILED
JAN 8 2003
OFFICE OF THE CLERK

No. 02-0865

In The
Supreme Court of the United States

LOBO GAMING, INC.,

Petitioner,

v.

PIT RIVER TRIBE OF CALIFORNIA,
and PIT RIVER GAMING COMMISSION,

Respondents.

On Petition For Writ Of Certiorari
To The Court Of Appeal Of California,
Third Appellate District

RESPONDENTS' BRIEF IN OPPOSITION

JEROME L. LEVINE
Counsel of Record
FRANK R. LAWRENCE
HOLLAND & KNIGHT LLP
633 West Fifth Street, 21st Floor
Los Angeles, CA 90071
Tel: (213) 896-2400
Fax: (213) 896-2450
Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Where an Indian Tribe's Constitution expressly reserves to its general membership the exclusive power to waive tribal sovereign immunity, and specifies the exclusive procedure by which a waiver must be accomplished, and neither condition was satisfied, may the authority to waive nevertheless be implied as a matter of contract law?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
REASONS FOR DENYING THE PETITION	1
STATEMENT OF THE CASE	3
A. The Pit River Tribe's Constitution Reserves to the General Membership the Exclusive Power to Waive Sovereign Immunity	3
B. The Contractual Dispute	5
C. The Decisions Below	6
ARGUMENT	7
A. There Is No Potential Lack of Uniformity of Decision Because the Opinion Below Was Not Published	7
B. Even Had it Been Published, the Opinion Below Would Not Conflict With *Smith*	8
C. There Is No Important Legal Question for this Court to Settle	11
1. The Law of Tribal Sovereign Immunity Is Settled	11
2. Tribal Law Governs the Tribe and Lobo Gaming	13
D. This Court Lacks Certiorari Jurisdiction Over This Case	16
CONCLUSION	18

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Adams v. Robertson, 520 U.S. 83 (1997).....14

Atkinson Trading Co., Inc. v. Shirley, 532 U.S. 645 (2001).....10, 15

Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. 408 (1989).....10, 15

Fisher v. District Court, 424 U.S. 382 (1976) (per curiam).....14

Key v. Doyle, 434 U.S. 59 (1977).....16

Kiowa Tribe of Oklahoma v. Manufacturing Techns., Inc., 523 U.S. 751 (1998).....12, 13

Kondos v. West Virginia, 318 F. Supp. 394 (S.D. W.Va. 1970).....15

McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973).....10, 14

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).....15

Montana v. U.S., 450 U.S. 544 (1981).....10, 11, 15

Namekagon Development Co., Inc. v. Boise Forte Reservation Housing Authority, 395 F. Supp. 23 (D. Minn. 1974).....13

Nevada v. Hicks, 533 U.S. 353 (2001).....10, 15

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983).....10, 14

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985).....17

Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165 (1977).....12

TABLE OF AUTHORITIES – Continued

Page

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 11, 12, 13

Schultz v. Greater New Orleans Expressway Commission, 250 F. Supp. 89 (E.D. La. 1966) 15

Snow v. Quinault Indian Nation, 709 F.2d 1319 (9th Cir. 1983) 12

South Dakota v. Bourland, 508 U.S. 679 (1993) 10, 15

Strate v. A-1 Contractors, 520 U.S. 438 (1997) 10, 15

United States v. Kagama, 118 U.S. 375 (1886) 10, 15

United States v. King, 395 U.S. 1 (1969) 12

United States v. Testan, 424 U.S. 392 (1976) 12

United States v. Wheeler, 435 U.S. 313 (1978) 10, 14

Williams v. Lee, 358 U.S. 217 (1959) 10, 14

World Touch Gaming, Inc. v. Massena Management LLC, 117 F. Supp. 2d 271 (N.D.N.Y. 2000) 12

STATE CASES

Casella v. City of Morgan Hill, 230 Cal. App. 3d 43 (1991) 7

Danka Funding Co., LLC v. Sky City Casino, 329 N.J. Super. 357, 747 A.2d 837 (1999) 12

Hydrothermal Energy Corp. v. Fort Bidwell Indian Community Council, 170 Cal. App. 3d 489 (1985) 12

R & P Capital Resources, Inc. v. California State Lottery, 31 Cal. App. 4th 1033 (1995) 7

TABLE OF AUTHORITIES – Continued

Page

Schmier v. Supreme Court of California, 78 Cal. App. 4th 703 (2000) 8

Smith v. Hopland Band of Pomo Indians, 95 Cal. App. 4th 1 (2002) ..... *passim*

STATUTES

25 U.S.C.

§ 2710 ..... 3, 5

28 U.S.C.

§ 1254 ..... 2, 16

§ 1257 ..... 2, 16, 17

REASONS FOR DENYING THE PETITION

Respondents respectfully request that the Court deny the petition for writ of certiorari for three reasons. First, the State court's unpublished decision below is not citable precedent, and as such it cannot conflict with existing federal or state law. Second, the opinion is correct on the unique facts of this case and is entirely consistent with well-established principles of federal Indian. Finally, petitioner failed to properly invoke this Court's jurisdiction.

The courts below recognized that the respondent Tribe's Constitution expressly reserves to its general membership the exclusive power to waive tribal sovereign immunity, and specifies the exclusive procedure by which a waiver must be accomplished. It was undisputed below that neither condition was satisfied. The Tribe's constitutional provision, read together with well-settled principles of federal Indian law, led both courts below to correctly hold that the Tribe's sovereign immunity was not validly and effectively waived.

Even had the California Court of Appeal published its opinion, it would not conflict with *Smith v. Hopland Band of Pomo Indians,* 95 Cal. App. 4th 1 (2002), contrary to petitioner Lobo Gaming's claims. In *Smith*, the underlying tribal law permitted the Hopland Band's Tribal Council to waive that Tribe's immunity by resolution, which it admitted doing. Here, by contrast, the respondent Tribe's Constitution reserves the power to waive immunity exclusively to the Tribe's general membership, and specifies the exact procedure by which any valid waiver must be granted. Neither condition was met. Given the differing tribal law and differing facts, it is unremarkable that the

Court of Appeal here reached a different result than did the *Smith* court. The reasoning underlying the opinions in both cases, however, is harmonious.

Nor is there any important legal question requiring resolution by this Court. It is well-settled that absent a valid, effective waiver, federally recognized Indian tribes retain sovereign immunity from suit. It is undisputed that the Pit River Tribe's constitutional language expressly reserves to its general membership the power to waive immunity, and does not grant that power to the small group of elected officials, the Tribal Council, that purportedly attempted to grant a waiver. It is equally settled that the Tribe has the right to be governed by its own laws and that non-members who come onto the reservation and voluntarily engage in consensual economic relations with a tribe, such as Lobo Gaming did here, subject themselves to tribal civil law. This Court's precedents have long settled these bedrock principles of federal Indian law, and they need not be revisited.

Finally, as alleged by Lobo Gaming, this Court lacks jurisdiction to grant the petition. Lobo's petition invokes this court's jurisdiction exclusively pursuant to 28 U.S.C. § 1254(1), which has no application here as Lobo does not petition from a case in a United States Court of Appeals. Moreover, Lobo's petition claims the lower court relied exclusively on tribal, rather than federal, law in reaching its decision. Thus even had Lobo Gaming invoked § 1257, permitting review of State court decisions, by Lobo's own characterization, the lower court did not decide the case based on a question of federal or state law.

No compelling reason exists for granting the petition, and this Court's jurisdiction has not been properly

invoked. For all of these reasons, the Petition should be denied.

STATEMENT OF THE CASE

A. The Pit River Tribe's Constitution Reserves to the General Membership the Exclusive Power to Waive Sovereign Immunity

Just as the United States Constitution separates powers among three distinct branches of government, so too does the Constitution of the Respondent Pit River Tribe of California ("Tribe"), a federally-recognized Indian Tribe.[1] The Tribe consists of eleven autonomous Bands, each of which elects a single representative to a Tribal Council. All adult enrolled tribal members constitute the Tribe's registered voters.

The registered voters collectively, the individual Bands, and the Tribal Council, each has distinct powers enumerated in the Tribe's Constitution. A true and correct copy of the Tribe's federally-approved Constitution is reproduced in the Appendix to this Respondent's Brief ("Resp. App.") *See* Constitution of the Pit River Tribe at Art. VII, § 1, Resp. App. at 7 (Tribal Council powers); *id.* at § 2, Resp. App. at 9 (Band powers); *id.* at § 3, Resp. App. at 10 (Reserved powers).

[1] Respondent Pit River Gaming Commission ("Commission") is the Tribe's gaming regulatory agency created and operated pursuant to a duly enacted and federally-mandated tribal ordinance. *See* 25 U.S.C. § 2710(d)(2).

The Tribe's Constitution expressly reserves the power to waive tribal sovereign immunity to the general membership, and specifies the exclusive process by which any valid waiver must occur:

> Section 3. Reserved Powers
>
> a. To waive the sovereign immunity of the Tribe to unconsented suit; however, no waiver of sovereign immunity shall be made except by a majority of the registered voters voting thereon at a meeting duly called, noticed and convened for that express purpose.

Const., Art. VII, § 3, ¶ a, Resp. App. at 10. As the California Court of Appeal noted, "[i]t is undisputed that the registered voters of the Tribe never voted on, and never approved, the agreement, nor did they vote on or approve any proposal for the Tribe to waive its sovereign immunity." Pet. App. at 3a.

The clause reserving to the general membership the exclusive power to waive sovereign immunity is the only reference to sovereign immunity in the Pit River Constitution. The Constitution separately enumerates the powers of the elected Tribal Council; significantly, however, nowhere in the Constitution is the Tribal Council vested with the power to waive the Tribe's sovereign immunity. *Cf.* Const., Art. VII, § 1, Resp. App. at 7-9. This is particularly noteworthy given that the Tribe as a whole also reserved for itself all powers not expressly delegated elsewhere in the Constitution. *See id.* at Art. VII, § 3, ¶ d, Resp. App. at 10.

B. The Contractual Dispute

Lobo Gaming alleges that in 1996, it entered into a contract to loan the Tribe money to build two casinos and lease to the Tribe various gambling machines, furniture and equipment for the casinos. As noted above, it is undisputed that the Tribe's registered voters never voted on, and never approved, the contract, nor did they vote on or approve any waiver of the Tribe's sovereign immunity in connection with Lobo Gaming's purported agreement. *See* Pet. App. at 3a. It is also undisputed that the Tribe paid Lobo approximately $1.7 million on an $800,000 loan, representing a greater than 100% return over an approximately three-year period.

Lobo Gaming nevertheless continued to claim it was owed additional amounts. The Tribe, on the other hand, noted that Lobo Gaming breached the alleged agreement in a number of material ways, not the least of which was failing to cooperate in the licensing process (including criminal background investigations) and failing to obtain a gaming license, all as required by State, federal and tribal law. *See* Hawkins Decl., ¶¶ 6-7; 25 U.S.C. § 2710(b)(2)(F); *id.* at § 2710(d)(2); 25 C.F.R. § 522.2(b)-(c); Tribal-State Gaming Compact Between the State of California and the Pit River Tribe, § 6; Pit River Tribal Gaming Ordinance, § 10. Tribal licensing is conducted under tribal gaming ordinances mandated and established by federal law. *See* 25 U.S.C. § 2710(b)(1)(B); *id.* at § 2710(d)(1)(A)(ii); 25 C.F.R. Part 522. Lobo Gaming also failed to build the second casino it had promised the Tribe.[2]

---

[2] Because of the threshold bar of the Tribe's sovereign immunity, the underlying facts regarding the contract and the parties' alleged

(Continued on following page)

C. The Decisions Below

The Tribe and Commission moved to quash service of summons and complaint on sovereign immunity grounds. The State trial court properly granted the motion, finding that:

> specially-appearing defendants are entitled to sovereign immunity in matters of commerce, including contracting. Defendant Tribe's Constitution, Art. VII § 1, confers on the Tribal Council power to contract, but Art. VII, § 3 reserves to the Tribe power "to waive sovereign immunity of the Tribe to unconsented suit." Plaintiff has failed to establish that the tribe waived its immunity, and has therefore failed to establish this Court has jurisdiction over the defendants.

Order Granting Specially-Appearing Defendants' Motion to Quash Service of Summons, Pet. App. at 15a-16a. The Court of Appeal affirmed in an unpublished opinion, holding that "the Pit River Tribal Council . . . did not have the authority to waive immunity without the consent of

---

performance or breach have not been litigated. Indeed, the Complaint was not Answered. Nevertheless, the Tribe is obligated to briefly address several of Lobo Gaming's more serious factual misstatements. *See* S. Ct. R. 15(2). First, Lobo's claim that the Tribal Council "held itself out" as having the power to waive the Tribe's sovereign immunity is false. The Tribe would contend that no such representation was ever made, nor could it have been given the constitutional language discussed above. Second, Lobo's claim that the Tribe "made no payments on the loan" is false. The Tribe would contend that it paid approximately $1.7 million in repayment on an $800,000 loan. Third, Lobo's claim that its "costs" exceeded $2 million is misleading. The Tribe would contend that this figure includes unaudited claims by Lobo to alleged lost profits, unearned salaries for its executives, and similar matters that are not "costs" in any conventional sense.

the tribal membership and such authority is not implicit in the Tribal Council's power to contract." Pet. App. at 2a.

ARGUMENT

A. There Is No Potential Lack of Uniformity of Decision Because the Opinion Below Was Not Published

The California Court of Appeal did not publish its opinion in this case. *See* Pet. App. at 1a ("NOT TO BE PUBLISHED"). California Rule of Court 977(a) provides that an unpublished opinion "shall not be cited or relied on by a court or a party. . . . " *Id. See also R & P Capital Resources, Inc. v. California State Lottery*, 31 Cal. App. 4th 1033, 1040 (1995) ("None of the orders or decisions are published cases and therefore are not properly citable as authority"); *Casella v. City of Morgan Hill*, 230 Cal. App. 3d 43, 58 (1991) ("We have not reviewed, or relied on, any unpublished opinion").[3] *Cf.* Ninth Circuit Rule 36-3 (as a general rule, "unpublished dispositions" are "not binding precedent" and "may not be cited to or by the courts of this circuit . . . ").

As a "typical opinion" not warranting publication under California Rule of Court 976(b), the decision "add[s] nothing to the body of stare decisis, and if published would merely clutter overcrowded library shelves and databases with information utterly useless to anyone other than the

[3] The Rule's very narrow exceptions are, by definition, not applications that could create a threat of inconsistency of decision. *See* Cal. R. Ct. 977(b).

actual litigants [here]in and complicate the search for meaningful precedent." *Schmier v. Supreme Court of California*, 78 Cal. App. 4th 703, 712 (2000). Recognizing this, the Tribe did not request publication under California Rule of Court 978.

Lobo Gaming's petition repeatedly urges this Court to grant its petition to resolve conflicts between the lower court's decision and other precedents, *see, e.g.*, Petition at 7, 11, 13, yet entirely fails to address this fundamental point. Without publication, there can be no conflict. For this reason alone, the petition should be denied.

B. Even Had it Been Published, the Opinion Below Would Not Conflict With *Smith*

Lobo Gaming's Petition claims a lack of uniformity with the case of *Smith v. Hopland Band of Pomo Indians*, 95 Cal. App. 4th 1 (1st Dist. 2002). Lobo is wrong. To those unfamiliar with Indian law, *Smith* might at first blush seem relevant: after all, it involves an Indian Tribe as a party to a contract in which the Tribe allegedly granted an immunity waiver. In fact, the *Smith* decision and the decision below in this case are readily harmonized. Their different results stem from the fundamentally differing tribal laws of two independent sovereign tribes, and the facts resulting therefrom.

Whereas the Pit River Tribe's Constitution expressly reserves to its general membership the power to waive immunity, the Hopland Band's elected tribal council possessed the power under tribal law to waive that tribe's immunity by council resolution. *See Smith*, 95 Cal. App. 4th at 4. A tribal leader admitted "that the Tribal Council, by resolution, approved the contracts" containing a waiver.

Id. at 7. Not surprisingly, the *Smith* court thus found that the terms of the tribal ordinance were satisfied because "the Tribal Council did pass a resolution approving the contract." *Id.* at 9.

The court found that:

> the purpose of the Tribal sovereign immunity ordinance is to insure that no waiver of sovereign immunity is made by a single Tribal officer, and that instead such waivers be made only by formal action of its governing body, the Tribal Council. That purpose is served here because, the Tribal Council, with full knowledge of its terms, approved the contract by resolution.

Id. at 9.

In our case, the purpose of the Pit River Tribe's constitutional reservation of the power to waive immunity is to insure that no waiver is made by the Tribal Council or any individual tribal member or Band, but instead that waivers are only granted by formal action of "a majority of the registered voters voting thereon at a meeting duly called, noticed and convened for that express purpose." Const. Art. VII, § 3, ¶ a, Resp. App. at 10.

Any proposal to subject the Pit River Tribe to suit must be carefully considered by the membership as a whole. It was taken so seriously as to be enshrined in the Tribe's Constitution as the very first reserved power. *See id.* Indeed, the provision even requires a special membership meeting for the specific purpose of deciding whether a waiver should be granted. *See id.* There is no subtlety or ambiguity in the constitutional requirement.

Unlike *Smith*, where tribal law permitted the elected Tribal Council to waive immunity and the court found that it had done so, the purpose of tribal law was not served here. The Tribe's exclusive waiver process, which was obviously designed to give its membership a voice in such matters, simply did not occur. *See* Pet. App. at 3a.

Smith also relied on the fact that "the contract itself specifies that it is to be governed by California law." *Id.* at 10. Thus "for purposes of interpreting and enforcing this contract, respondent agreed to be governed by California law, not tribal law." *Id.* at 11.[4] In our case, on the other hand, the purported contract Lobo Gaming sued upon does not contain a choice of law provision. Under settled principles of federal Indian law discussed below at section (C)(2) of this Respondents' Brief, tribal law governs both the Tribe and Lobo since it engaged in "consensual relationships with the tribe or its members, through commercial

---

[4] In *dicta*, *Smith* questioned the need to refer to tribal law. *See id.* at 10. Curiously, its short discussion of this issue, *see id.*, failed to mention this Court's precedent's discussed below at section (C)(2) of this Respondent's Brief, holding that Tribes retain the sovereign right to be governed by their own law. *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983); *United States v. Wheeler*, 435 U.S. 313, 322 (1978); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 171-72 (1973); *Williams v. Lee*, 358 U.S. 217, 219-20 (1959); *United States v. Kagama*, 118 U.S. 375, 381-82 (1886). *Smith's dicta* also failed to cite or discuss this Court's precedents, also discussed below, holding that Indian tribes' civil laws apply to non-members who engage in consensual economic relations with Tribes on the reservation, as occurred here. *See Nevada v. Hicks*, 533 U.S. 353, 371 (2001); *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 651 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438, 456-57 (1997); *South Dakota v. Bourland*, 508 U.S. 679, 695 (1993); *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408, 419 (1989); *Montana v. U.S.*, 450 U.S. 544, 565 (1981).

dealing, contracts, leases, or other arrangements." *Montana v. U.S.*, 450 U.S. 544, 565 (1981).

Smith concluded that "we are not presented with a circumstance in which a tribal agent has signed a contract without authority to act on the Tribe's behalf." *Id.* at 8. Here, the circumstances are different: it is undisputed that the Pit River Tribe's Constitution reserves to the general membership the power to waive the Tribe's sovereign immunity, and that the general members never approved a waiver as to Lobo. *See* Pet. App. at 2a-3a; Const., Art. VII, § 3, ¶ a, Resp. App. at 10.

For these reasons, even if the Court of Appeal's opinion below in our case had been published, it would not create any lack of uniformity with *Smith*. Thus, the petition should also be denied for this reason.

C. There Is No Important Legal Question for this Court to Settle

The legal issues involved in this case do not require the Court's attention because they are well-settled matters of federal Indian law.

1. The Law of Tribal Sovereign Immunity Is Settled

This Court has long recognized that Indian tribes possess "the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978). This immunity extends to suits on contracts, regardless of whether they involve commercial or governmental activities, or were

made on or off a reservation. *See Kiowa Tribe of Oklahoma v. Manufacturing Techns., Inc.*, 523 U.S. 751, 760 (1998).

Because federal Indian policy favors preserving tribal resources and autonomy, this Court has repeatedly stated that a waiver of tribal sovereign immunity "'cannot be implied but must be unequivocally expressed.'" *Santa Clara Pueblo*, 436 U.S. at 58-59 (*quoting United States v. Testan*, 424 U.S. 392, 399 (1976); *United States v. King*, 395 U.S. 1, 4 (1969)). "Absent an *effective* waiver or consent," Indian tribes are immune from suit. *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165, 172 (1977) (emphasis added). An unauthorized or *ultra vires* purported waiver of tribal sovereign immunity is per se "[in]effective. . . . " *Id. Cf. Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1322 (9th Cir. 1983) (tribal official's acceptance of service of process did not waive tribal immunity); *World Touch Gaming, Inc. v. Massena Mgmt. LLC*, 117 F. Supp. 2d 271, 275 (N.D.N.Y. 2000) (the "Management Agreement . . . cannot be read to authorize waiver of sovereign immunity"); *Danka Funding Co., LLC v. Sky City Casino*, 329 N.J. Super. 357, 366, 747 A.2d 837, 842-43 (1999) ("The Tribe, through its laws, describes how one may obtain a legally enforceable waiver of that immunity. Neither Danka Business Services nor Danka Funding took advantage of those provisions"); *Hydrothermal Energy Corp. v. Fort Bidwell Indian Community Council*, 170 Cal. App. 3d 489, 496 (1985) ("[tribal chairperson] Lame Bull could not waive the tribe's immunity, unless the Tribe had expressly delegated that duty to her. Nothing in the Tribe's Constitution and bylaws gave her such authority").

The purported waiver contained in the Agreement with Lobo Gaming did not effect a waiver of the Tribe's sovereign immunity.[5]

2. Tribal Law Governs the Tribe and Lobo Gaming

Lobo Gaming has never disputed the Tribe's right to be governed by its own Constitution. Nor has Lobo Gaming ever disputed that it was also subject to tribal civil law by virtue of having engaged in consensual economic relations with the Tribe on its reservation. To the extent that Lobo at this late hour seeks to contest these settled matters, it is procedurally untimely and substantively wrong. *See* S.Ct. Rule 14(1)(g)(i) (requiring Lobo to specify "the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal

---

[5] To *imply* the authority to waive immunity in the distinct power to contract as Lobo Gaming urges would ignore the express language to the contrary in the Tribe's Constitution, and would also violate the controlling rule that waivers of tribal sovereign immunity must be express and unequivocal and that Indian tribes do not waive sovereign immunity merely by entering a contract. *See Kiowa Tribe*, 523 U.S. 751, 118 S. Ct. 1700; *Santa Clara Pueblo*, 436 U.S. at 58-59. Lobo Gaming's reliance in this regard on *Namekagon Development Co., Inc. v. Boise Forte Reservation Housing Authority*, 395 F. Supp. 23 (D. Minn. 1974) *aff'd*, 517 F.2d 508 (8th Cir. 1975), is misplaced.

The issue in *Namekagon* was whether a tribal corporation – the Bois Forte Reservation Housing Authority – was immune from suit. While the district court dismissed the tribe and its business committee from the suit on sovereign immunity grounds, it ruled that "the Housing Authority [was] a separate corporation not cloaked with the Tribe's legal immunity." 395 F. Supp. at 26. Obviously, the issue addressed in *Namekagon* is far afield from the issue decided here by the Court of Appeal.

questions sought to be reviewed were raised; the method of raising them and the way in which they were passed on by those courts"); *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (Court generally has "adhered to the rule in reviewing state court judgments . . . that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review").

Lobo's verified complaint alleged that "[s]ubstantially all material acts alleged herein took place on the Tribe's reservation," Verified Complaint at ¶ 4. Lobo failed to raise any question below about the application of the Tribe's Constitution to the Tribe and its consequential effect on Lobo. Even if the Court were inclined to examine these new issues, it would not aid Lobo.

The fact that the Tribe is governed by its Constitution is axiomatic. This Court has long held that "[a] tribe's power to prescribe the conduct of tribal members has never been doubted, and our cases establish that 'absent governing Acts of Congress,' a State may not act in a manner that 'infringed on the right of reservation Indians to make their own laws and be ruled by them.'" *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 332 (*quoting McClanahan*, 411 U.S. at 171-72; (*quoting Williams*, 358 U.S. at 219-20); and *citing Fisher v. District Court*, 424 U.S. 382, 388-89 (1976) (per curiam)). This Court has consistently held for more than a century that "[t]he sovereignty retained by tribes includes 'the power of regulating their internal and social relations . . . .'" *Mescalero Apache Tribe*, 462 U.S. at 332 (*quoting Kagama*, 118 U.S. at 381-82; and *citing Wheeler*, 435 U.S. at 322).

Lobo Gaming subjected itself to the effects of tribal civil law by voluntarily coming onto the Tribe's reservation and doing business. As this Court noted years before, Lobo Gaming engaged in business dealings with the Tribe, "[a] nonmember who enters the jurisdiction of the tribe remains subject to the risk that the tribe will later exercise its sovereign power." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 145 (1982).

This Court has long held that "[a] tribe may regulate . . . the activities of nonmembers who enter into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565. This decades-old jurisdictional rule remains the law today. *See Hicks*, 533 U.S. at 371; *Atkinson Trading Co., Inc.*, 532 U.S. at 651; *Strate*, 520 U.S. at 456-57; *Bourland*, 508 U.S. at 695; *Brendale*, 492 U.S. at 419.[6]

---

[6] Lobo Gaming's reliance on cases finding waivers of sovereign immunity inherent in the act of contracting misses the point entirely. None of the cases Lobo Gaming cites involve sovereign entities with express constitutional provisions regarding the authority and procedure for granting valid immunity waivers. This is not to say that the Pit River Tribe's constitutional provisions regarding immunity are necessarily unique. *See, e.g., Kondos v. West Virginia*, 318 F. Supp. 394 (S.D. W.Va. 1970) (West Virginia Constitution provided that the State's immunity from suit cannot be waived by the Legislature); *Schultz v. Greater New Orleans Expressway Commission*, 250 F. Supp. 89 (E.D. La. 1966) (Louisiana Constitution authorized the Legislature to waive the State's immunity, but provided that "No suit authorized under this constitutional provision shall be instituted in any court other than a Louisiana State court").

D. This Court Lacks Certiorari Jurisdiction Over This Case

As alleged by Lobo Gaming, this Court lacks jurisdiction to grant the petition. Lobo's petition invokes this court's jurisdiction exclusively pursuant to 28 U.S.C. § 1254(1), which simply does not apply here. *See Key v. Doyle*, 434 U.S. 59, 72, n. 5, 98 S.Ct. 280, 287 n. 5 (1977) (noting that "the scope of appellate jurisdiction specified by § 1257 for state-court decisions is different from that provided under § 1254 for decisions of the United States courts of appeals") (White, J., dissenting). Lobo does not petition from a case in a United States Court of Appeals.

Petitions for writs of certiorari to review State court decisions must satisfy the jurisdictional criteria of 28 U.S.C. § 1257. Section 1257 only allows this Court to review state court decisions

> where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Id. at § 1257(a).

Lobo's petition claims the lower court relied exclusively on tribal, rather than federal, law in reaching its decision. *See* Petition at 10 ("In making this determination the court looked exclusively at tribal law, *i.e.*, Article VII § 3.a of the Tribal Constitution"). While the lower court's

opinion certainly discusses settled principles of tribal sovereign immunity, the case was indeed decided based on tribal law. The federal courts' interpretations of tribal law might be characterized as federal common law, but Lobo has not made that argument.

In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), this Court acknowledged that it "can have no concern with the substantive merits of common-law decisions reached by state courts faithfully applying their own law or the law of another State." *Id.* at 834. The same may be said of a State court applying the law of an Indian tribe in a case in which no federal rights, privileges or immunities are at issue. Nothing on the face of 28 U.S.C. § 1257 gives this Court certiorari jurisdiction to review such a case.

Phillips Petroleum Co. explained that "[t]he Constitution does not expressly mandate particular or correct choices of law. Rather, a state court's choice of law can invoke constitutional protections, and hence our jurisdiction, only if it contravenes some explicit constitutional limitation." *Id.* at 834. Lobo Gaming complains that the lower State court erred by choosing to adhere to clear, explicit tribal law, but does not allege that this purported error contravened any explicit federal constitutional, statutory or treaty limitation.

Thus even had Lobo Gaming's petition invoked 28 U.S.C. § 1257, by its own characterization, the lower court did not decide the case based on a question of federal or state law allowing review by this Court.

CONCLUSION

The Court of Appeal's judgment was not published, does not create any lack of uniformity in California or federal law, and does not present an important legal question requiring resolution by this Court. Petitioner also failed to properly invoke this Court's jurisdiction. For these reasons, the Tribe and Commission respectfully request that the Court deny the petition.

Respectfully submitted,

HOLLAND & KNIGHT LLP
JEROME L. LEVINE
Counsel of Record
FRANK R. LAWRENCE
HOLLAND & KNIGHT LLP
633 West Fifth Street, 21st Floor
Los Angeles, CA 90071
Tel: (213) 896-2400
Fax: (213) 896-2450

Counsel for Respondents

CONSTITUTION OF THE PIT RIVER TRIBE

PREAMBLE

The Pit River Tribe, a Tribe of eleven (11) autonomous bands of Indians that adopted a formal written Constitution on August 16, 1964, for the purpose of securing our Rights & Powers inherent in our Sovereign status as reinforced by the laws of the United States, developing and protecting Pit River (Ajumawi – Atsugewi) ancestral lands and all other resources, preserving peace and order in our community, promoting the general welfare of our people and our descendants, protecting the rights of the Tribe and of our members, and preserving our land base, culture and identity, does hereby establish this revised Constitution.

ARTICLE I – NAME

The name of this entity is the Pit River Tribe (Ajumawi – Atsugewi Nation) comprised of the eleven (11) autonomous bands: Ajumawi, Atsugewi, Atwamsini, Ilmawi, Astarawi, Hammawi, Bewisedawi, Itsatawi, Aporige, Kosalektawi and Madesi, that since time immemorial have resided in the area known as the 100-mile square, located in parts of Shasta, Siskiyou, Moduc, and Lassen Counties in the State of California, as referred to in Pit River Docket No. 347, (7 ICC B15 at 844), Indian Claims Commission.

ARTICLE II – TERRITORY AND JURISDICTION

Section 1. Territory. The territory of the Tribe consists of all ancestral lands recognized by the Indian Claims Commission in its July 29, 1959, (7 Indian Claims Commission, 815-863 Appendices A & B pages 1-49) findings of

fact and opinion in Docket No. 347, i.e., the 100-mile square as described in Docket No. 347, and specifically including, but not limited to, the XL Ranch, Montgomery Creek, Roaring Creek, Big Bend, Burney, Lookout and Likely Rancherias, the 13 acres deeded to the United States by the State of California in trust for the Pit River Home and Agricultural Cooperative Association as trustee for the Tribe, Modoc County Assessor's parcels 013-172-07 and 013-191-01, and any other property that hereafter may be acquired by or for the Tribe.

Section 2. Jurisdiction. The jurisdiction of the Tribe under this Constitution shall extend throughout its territory. Nothing in this Article shall be construed to limit the ability of the Pit River Tribe (Ajumawi-Atsugewi Nation) to exercise its jurisdiction to the fullest extent permitted by Federal law, including but not limited to, lands, waters, properties, air space, fish and wildlife and other resources.

ARTICLE III – MEMBERSHIP

Section 1. Membership Criteria. Membership in the Pit River Tribe (Ajumawi-Atsugewi Nation) shall be open to all persons who meet the following criteria:

a. He/She is at least 1/4 Pit River Indian blood and is not enrolled in any other federally recognized Tribe.

b. Any child born to enrolled members regardless of blood quantum and as long as he/she is not enrolled in any other federally recognized Tribe.

Section 2. Base Membership Roll. There shall be a Base Membership Roll which shall consist of the persons who are deemed to have met the criteria set forth in Section I hereof by virtue of any one of the following:

a. He/She was accepted into Tribal membership under the Constitution adopted on August 16, 1964, or

b. He/She was listed by the Bureau of Indian Affairs as eligible to register to vote in the the [sic] election of the Constitutional Drafting Committee held on December 10, 1983, or

c. He/She was listed as a Pit River Indian on the 1928 Census roll and is at least 1/4 Indian blood or descendant thereof.

Section 3. Enrollment of Additional Members. All other persons who hereafter meet the criteria set forth in Section 1, and Section 2, shall be eligible to enroll for membership under an ordinance hereafter enacted by the Tribal Council.

Section 4. Revocation of Membership by Enrollment in another Federally Recognized Tribe. Membership in the Nation shall be automatically revoked upon a person's enrolling as a member of any other federally recognized Indian Tribe. Any person whose membership is revoked for this reason may be reinstated as a member of the Pit River Tribe (Ajumawi-Atsugewi Nation) upon his/her submission of proof to the Tribal Council that he/she has withdrawn his/her enrollment in all other federally recognized Indian Tribes or, in the alternative, that he/she has taken all necessary and reasonable steps to effectuate a withdrawal of his/her enrollment in all other federally recognized Indian Tribes.

ARTICLE IV – BILL OF RIGHTS

The Pit River Tribe (Ajumawi-Atsugewi Nation) in exercising its powers shall guarantee to all persons subject to its jurisdiction the applicable protections set forth in the

Indian Civil Rights Act of April 1, 1968, (82 Stat. 77) except as may be inconsistent with the exercise of the Tribe's right to its traditional form of Tribal government.

ARTICLE V – OCCUPANCY PRIVILEGES OF EXISTING RESIDENTS OF TRIBAL LANDS

Section 1. XL Ranch. There are on the XL Ranch certain lands and structures which have been assigned to specific persons under revocable permits issued by the Bureau of Indian Affairs and/or the Pit River Home and Agricultural Cooperative Association. Said revocable permits did not create or confer upon any individual any vested rights to XL Ranch lands or improvements, and the Tribe does not recognize the existence of any such rights. However, in order to avoid the imposition of undue hardship upon Tribal members who in good faith have lived on the XL Ranch pursuant to and in compliance with such revocable permits, the Tribe hereby establishes the following procedure to ensure that said members receive preference in the assignment of such Tribal lands as they heretofore have used and occupied under and in compliance with revocable permits:

a. Each person holding revocable homesite and farm/pasture field permits on February 3, 1975, shall be entitled to apply for a lifetime, non-inheritable assignment of the same homesite and farm/pasture field, subject to the same terms and conditions as his/her revocable permit in effect on February 3, 1975, and such application shall be granted in accordance with procedures established pursuant to Section 3 of this Article;

b. If the permit-holder as of February 3, 1975, is deceased, his/her resident spouse or an adult Indian member

of the deceased permittee's immediate family who was an actual and permanent resident of the deceased permittee's household on the XL Ranch on February 3, 1975, shall be entitled to apply for the non-inheritable lifetime assignment for which the deceased permittee would have been eligible if living. No further or other preferences in the assignment of Tribal lands shall be given;

c. No permittee as of February 3, 1975, shall be entitled to the preferential assignment of more than one homesite and/or farm/pasture field; no permittee or successor of a deceased permittee shall be entitled to the preferential assignment of any land not actually permitted to him/her or his/her predecessor on February 3, 1975;

d. Each permittee to whom a lifetime assignment is made and who actually was engaged in raising cattle on the XL Ranch on February 3, 1975, shall be entitled during the duration of his/her assignment to continue to use XL Ranch grazing lands to raise his/her own cattle, provided that the Tribal Council shall have full authority to assign all grazing lands and to determine the number of cattle which may be pastured on each grazing unit.

Section 2. Rancherias. This section shall include the unallotted Pit River trust lands known as Big Bend, Montgomery Creek, Roaring Creek, Likely, Lookout and the forty (40) acres acquired adjacent to Montgomery Creek in 1984. Each Pit River Indian head-of-household who is an actual resident on the effective date of this Constitution and who has resided thereon for at least three (3) years prior to the date or has moved off the Rancheria for socio-economic reasons with the intent to re-establish residency shall be guaranteed continued use and occupancy of such residence and other real property upon

application to the Tribal Council. All others who are residents on the effective date of this Constitution have the right to apply for a homesite. The Tribal Council retains the right to accept or deny all applications subject to the right of appeal to the Tribal court established pursuant to Section 1(o) of Article VII.

Section 3. The Tribal Council shall enact a tribal ordinance governing the use, assignment, permitting, lease or other disposition of lands, interest in lands and resources of the Tribe consistent with this Constitution and Federal law.

ARTICLE VI – LEGISLATIVE & EXECUTIVE

Section 1. Legislative Department. The Legislative Department of the Tribe shall be the Tribal Council, composed of the elected Representatives of the eleven (11) component Bands. Candidates for Band representatives to the Tribal Council (Councilperson) shall be nominated from among and elected by the majority vote of those band members in attendance at the annual Tribal election meeting in August, or at a specially-called band meeting within thirty (30) days after the annual meeting. All council positions will be for the term of one (1) year.

Section 2. Executive Department. The Executive Department of the Tribe shall be the Tribe's Officers, and shall consist of the Tribal Chairman, Vice-Chairman, Secretary, Recording Secretary, Treasurer and Sergeant-at-Arms. It shall be the responsibility of the Executive Department to carry out the laws and policies enacted by the Tribal Council. The Tribal Chairman shall be elected for a term of two (2) years; all other officers shall be elected for a term of one (1) year. These positions shall be

filled from and elected by the general membership at the annual meeting in August.

ARTICLE VII – POWERS

Section 1. Tribal Council. The Tribal Council shall have the following powers:

a. To negotiate, consult and contract with Federal, State and Tribal governments, private enterprises, individuals and other organizations.

b. To employ and discharge legal counsel; the choice of counsel and fixing of fees are subject to the approval of the Secretary of the Interior as long as such approval is required by Federal law.

c. To prevent the sale, disposition, lease or encumbrance of Tribal lands, interests in land or other Tribal assets that are not in the best interest of the tribe.

d. To Charter and regulate independent organizations, subordinate organizations, committees and boards of officials of the Tribe and delegate powers as appropriate, retaining the right to supervise and rescind delegated powers.

e. To plan and manage all economic affairs and enterprises of the Tribe.

f. To regulate the use of Tribal privileges and property.

g. To disburse Tribal funds as the council deems appropriate for the benefit of the Tribe.

h. To promote and protect the health, peace, morals, education, safety and welfare of the Tribe, its members and all other persons within its jurisdiction, and

govern the conduct of Tribal members while on Tribal property.

i. To regulate all Administrative and Legislative bodies of the Tribe, Tribal agencies, officers and organizations.

j. To levy such taxes as may be deemed appropriate on persons, property and business enterprises that are under Tribal jurisdiction. The Tribal Council shall determine the rate and use of such taxes.

k. To provide for the exclusion of persons from Tribal property or membership for good cause. Such exclusion shall be pursuant to a Tribal ordinance that provides for due process of law.

l. To assign, lease or regulate Tribal lands, interests in lands or other Tribal assets, subject to such approval for leasing as may be required by Federal law.

m. No single Council member or group of Council members can act on behalf of the Tribe without the approval of a quorum of the Council.

n. To form or join Tribal courts, consortiums and other Indian organizations for the purpose of asserting and protecting the rights of the Tribe and its members under the Indian Child Welfare Act of 1968 (25 U.S.C. Section 1901, et seq.), and reassuming jurisdiction over Indian child custody proceedings as authorized by the Indian Child Welfare Act (25 U.S.C. Section 1918).

o. To establish a Tribal judicial system and promulgate Tribal Court rules.

p. To appoint a Council designee to act in the absence of the Tribal Chairman or Officers.

q. To sue on behalf of the Tribe.

r. To enact an Ordinance providing for the establishment of an appointed advisory committee of elders to consult with the Council on matters pertaining to Tribal lands, membership and traditions.

s. To enact all ordinances and resolutions which shall be necessary and proper for carrying into effect the foregoing powers.

t. To exercise all powers vested in it by existing law, Tribal traditions and applicable Federal and State law, and such further powers as may in the future be granted to the Tribal Council by members of the Tribe, the United States or the State of California.

Section 2. Band Powers. Each band shall have the following powers:

a. The band is to approve its own membership subject to eligibility requirements as set forth in Article III – Membership, and to keep a current band roll so as not to allow dual enrollment in other ancestral bands.

b. To have priority approval/disapproval in matters of individual Band religious, cultural and/or archaeological concerns, provided that such concerns are not a detriment to the Tribe as a whole.

c. To form a cultural resource committee to protect and promote its individual heritage.

d. To choose and elect a person of its choice to represent the band on the Tribal Council, and to elect an alternate Council person who may sit in the absence of the Council person.

e. The Band is an autonomous unit within the Tribe and has the right to choose not to participate in Tribal affairs; *provided* that a majority of the registered voters of that particular Band votes not to participate at

a specially-called, duly-petitioned and noticed meeting conducted for that purpose by the Tribe's Election Committee. A Band which has elected not to participate in Tribal affairs may rescind that election by the vote of a majority of the registered voters of the Band at a specially-called, duly-petitioned and noticed meeting conducted for that purpose by the Tribe's Election Committee.

Section 3. Reserved Powers.

a. To waive the sovereign immunity of the Tribe to unconsented suit; however, no waiver of sovereign immunity shall be made except by a majority of the registered voters voting thereon at a meeting duly called, noticed and convened for that express purpose.

b. To veto decisions of the Tribal Council under the procedures of Article IX, Elections.

c. To decide issues of land sales, with no provisions for absentee balloting on such issues.

d. To exercise any rights and powers vested in the Tribe, but not expressly referred to in this Constitution; however, such exercise shall be by vote of a majority of the registered voters voting thereon at a meeting duly called, noticed and convened for that express purpose.

ARTICLE VIII – DUTIES OF OFFICERS

Section 1. Tribal Chairman. The Chairman shall exercise the following powers and such other powers as the Tribal Council may assign:

a. The Chairman shall preside at all meetings in accordance with the provisions of this Constitution;

b. The Chairman shall execute for and on behalf of the Pit River Tribe (Ajumawi-Atsugewi Nation) any and all papers, documents and writings authorized by the Council at any annual, regular or special meeting thereof;

c. The Chairman shall appoint the members of all special committees authorized by the Tribal Council;

d. The Tribal Chairman shall have general supervision over the executive department of the Tribal government;

e. The Chairman shall act as the official spokesman or representative of the Tribe, except when the Tribal Council has designated another person for that purpose;

f. The Chairman shall have the power to appoint an Acting Secretary and/or Acting Recording Secretary if the absence of either officer renders such appointment necessary to conduct Tribal Business.

Section 2. Vice-Chairman. The Vice-Chairman shall act with the power and authority of the Chairman in his/her absence or disability, and may, if authorized by the Chairman, assist the Chairman in the performance of his duties.

Section 3. Secretary. The Secretary shall receive and, upon request of the Chairman, answer or attest to the authenticity of all correspondence for the Tribe and the Council, and shall keep and maintain files thereof, and shall verify enrollment of Tribal members to appropriate agencies as well as to maintain the base roll of the tribe and keep current the tribal membership roll.

Section 4. Recording Secretary. The Recording Secretary shall keep and maintain in a permanent record book a

record and minutes of all transactions and meetings of the Tribe and the Tribal Council, and shall upon request of the Chairman, attest to the authenticity thereof.

Section 5. Treasurer. The Treasurer shall receive, deposit and disburse the funds of the Tribe, and shall keep an account and records thereof in a permanent record book, as required and directed by the Council. The Treasurer shall disburse all funds as ordered by the Council.

Section 6. Sergeant-at-Arms. The Sergeant-at-Arms shall keep order at all meetings of the Tribe and the Tribal Council.

Section 7. Other Officers. Persons appointed/elected to such other offices as the Tribal Council hereafter may create shall have and exercise such powers and duties as the Tribal Council may specify, consistent with this Constitution.

ARTICLE IX – ELECTIONS

Section 1. First Election. The first election of officers under this Constitution shall be held at the August annual meeting of the Tribe following the ratification thereof. The officers serving under the Tribe's former Constitution when this Constitution is ratified shall continue in office until their successors are elected hereunder.

Section 2. Election Ordinance. Within 180 days after ratification of this Constitution, the Tribal Council shall enact an Election Ordinance which establishes an Election Committee and the rules and procedures under which that Committee shall conduct and supervise Tribal elections and Band elections held pursuant to Article VII, Section 2(e).

Section 3. Qualifications for Office. Any enrolled Tribal member at least eighteen (18) years of age shall be qualified to be elected as a Tribal Officer. Any enrolled Band member at least eighteen (18) years of age shall be qualified to be elected as Councilperson for the Band of which he/she is a member.

Section 4. Voter Qualification. Voting in Tribal elections shall be limited to enrolled Tribal members who are at least eighteen (18) years of age on the date of the election in which they vote.

Section 5. Recall

a. Tribal Officers. Within thirty (30) days after receipt by the Election Committee of a valid petition signed by at least fifty (50) registered/enrolled adult members of the Tribe, the Election Committee shall schedule and conduct a special meeting of the Tribe at which the membership shall vote by secret ballot on the recall of any elected Tribal Officer. At least ten (10) days before said meeting, the officer shall be given a copy of the recall petition submitted to the Election Committee, and shall be given an opportunity to address the persons attending the recall meeting before voting begins. Said meeting shall be subject to the quorum provisions set forth in Article XI, Section 2(a). An elected official may be subjected to recall proceedings only once during any term of office.

b. Councilmembers. Upon representation to the Tribal Council of a petition for the recall of the Council member, validated by the Election Committee as signed by a majority of the enrolled/registered adult members of the Band(s) represented by the Council member named in said Petition, that member shall be deemed recalled. Within thirty (30) days after presentation of such a petition to the Tribal

Council, the Election Committee shall schedule and conduct among the members of the Band(s) whose Council member was recalled, a duly-noticed special meeting at which the adult Band members shall elect a successor Council member to serve until the next annual general meeting of the Tribe.

Section 6. Initiative. Upon receipt by the Election Committee of a valid petition signed by at least fifty (50) of the enrolled/registered adult members of the Tribe, the election Committee shall call and conduct within sixty (60) days, an initiative election at a special meeting of the Tribe. Such meeting shall be for the purpose of presenting to the qualified voters for their determination any issue or question except recall, and as otherwise provided by this constitution. Said meeting shall be subject to the quorum provisions set forth in Article XI, Section 2(a). A decision by the majority of those voting shall be binding on the Tribal Council until it expires by its own terms or is otherwise changed by action of the voters. Once an initiative issue has been submitted to the voters and rejected, that same issue shall not again be considered for such action for at least six (6) months.

Section 7. Referendum upon receipt of a valid resolution supported by an affirmative vote of a quorum of the Tribal Council, the Election Committee shall refer to the voters for their determination, such issue(s) as may be requested by the Tribal Council. The referendum may be conducted at an annual or special meeting of the Tribe. Said meeting shall be subject to the quorum provisions set forth in Article XI, Section 2(a). A majority of those voting shall decide the issue and such decisions shall be binding on the Tribal Council until otherwise changed by the voters.

ARTICLE X – VACANCIES AND REMOVAL

Section 1. Officers

a. Tribal Chairman. In the event that the position of Tribal Chairman becomes vacant by death, resignation or incapacitation, the Vice-Chairman automatically shall succeed the Chairmanship. The Vice-Chairman shall serve as Chairman until the next regularly scheduled election of Chairman.

b. Other Elected Officers. Vacancies by reason of death, resignation or incapacitation in the offices of Vice-Chairman, Secretary, Recording Secretary, Treasurer and Sergeant-at-Arms shall be filled by appointment by the Tribal Council within fourteen (14) days after the office becomes vacant. Appointees shall serve until the holding of a special general election meeting, or until the next regularly scheduled general election meeting, whichever is sooner.

Section 2. Council Members

a. Vacancies on the Tribal Council shall be filled by an election conducted by the Election Committee among the members of the Band(s) represented by the vacant position, within thirty (30) days after the position becomes vacant. The successor thus elected shall serve until the next regularly-scheduled Tribal general election meeting.

b. The Tribal Council may declare a Council seat vacant if a member misses three (3) consecutive meetings or commits any unlawful act which results in financial loss to the Tribe.

ARTICLE XI – MEETINGS

Section 1. Tribal Council

a. Quorum. Six of the eleven elected members of the tribal Council, or their alternates, shall constitute a quorum. No enactment of the Tribal Council will be valid in the absence of a quorum. Once a quorum is established at a meeting, it shall continue until the meeting is officially adjourned, provided that at least four Council members are present.

b. Regular Meetings. Regular meetings of the Tribal Council shall be held monthly at a place and date established by ordinance of the Tribal Council. The Tribal Secretary shall be responsible for telephoning or sending written notices to each Council member so as to provide at least one (1) day advance notice of the meeting if the regular meeting date and/or place should have to be changed. The Tribal Council shall have the authority to meet and act in executive session at any Tribal Council meeting for the purpose of discussing and voting upon matters having to do with personnel, and when confidentiality is necessary to protect the rights, interests and positions of the Tribe.

c. Special Meetings. Special meetings of the Tribal Council may be called by the Chairman at his discretion, or shall be called by the Chairman upon the written request of at least three (3) members of the Tribal Council; *provided*, that the reason for the meeting is stated in the request and that each member of the Tribal Council is given at least 24 hours advance notice of any special meeting. Upon refusal by the Chairman to call a special meeting within 24 hours upon the written request of three (3) members of the Tribal Council, those members who

requested the special meeting may proceed to call and conduct the special meeting.

Section 2. General Membership:

a. Quorum of General Membership for purposes of Recall, Article IX, Sec. 5; Initiative, Article IX, Sec. 6; and Referendum, Article IX, Sec. 7. Fifty (50) qualified voters of the tribe shall constitute a quorum at meetings of the general membership for purposes of Recall, Initiative and Referendum. No action of the general membership for purposes of Recall, Initiative or Referendum shall be valid in the absence of a quorum.

b. Annual meetings. The general membership of the Tribe shall meet annually in August on a date, time and place established by the Tribal Council. The Tribal Secretary shall cause notice of the Annual meeting to be given at least thirty (30) days in advance of said meeting.

c. Special Meetings. Special general meetings may be called at the discretion of the Tribal Chairman; *provided*, that in each instance, a notice stating the date, time, place and purpose of the meeting shall be posted and published at least three days in advance thereof. Special meeting shall be called by the Tribal Chairman upon his/her receipt of a valid request signed by at least fifty (50) of the Tribe's enrolled/registered adult members, or by resolution of the Tribal Council. The petition or resolution must state the purpose of the meeting. If, upon validation of the petition by the Election Committee, the Tribal Chairman does not call and notice the meeting within fifteen (15) days after validation, the Tribal Vice-Chairman shall exercise such authority.

ARTICLE XII – SEVERABILITY & SAVINGS AND RATIFICATION OF PRIOR TRIBAL ACTIONS

Section 1. Severability and Savings Clause

If any provisions of this Constitution shall, in the future, be declared invalid by a court of competent jurisdiction, the invalid provision or provisions shall be severed and the remaining provisions shall continue in full force and effect.

Section 2: Ratification of Prior Tribal Actions

The Pit River Tribe (Ajumawi-Atsugewi Nation) hereby ratifies all actions taken by the Tribe and/or the Tribal Council under the Tribe's 1964 Constitution, and such actions as are consistent with this Constitution shall be of continuing effect.

ARTICLE XIII – AMENDMENTS

This Constitution may be amended by a majority vote of the enrolled members of the Tribe voting at an election called for that purpose by the Election Committee pursuant to Article IX, Section 6 and/or 7. It shall be the duty of the Election Committee to call an election on any proposed amendment upon the receipt of a valid petition signed by at least fifty (50) of the Tribe's enrolled/registered adult members, or by a resolution passed by an affirmative vote of a quorum of the members of the Tribal Council.

ARTICLE XIV – ADOPTION

This Constitution shall become effective when adopted by a majority vote of the registered adult Pit River Tribe (Ajumawi-Atsugewi Nation) voters who cast ballots at an

election called and conducted pursuant to regulations of the Secretary of the Interior.

ARTICLE XV
CERTIFICATE OF RESULTS OF ELECTION

Pursuant to a Secretarial Election authorized by Assistant Secretary – Indian Affairs the attached Constitution was submitted to the qualified voters of the tribe and on August 15, 1987, was duly adopted by a vote of 51 for and 29 against and 11 cast ballots found spoiled or mutilated in an election in which at least 30 percent of the 123 members entitled to vote, cast their ballot in accordance with 25 CFR 81.

/s/ Amy L. Dutschke — 8/16/87
Amy L. Dutschke — Date
Chairperson, Election Board

/s/ Martha Kaiser — 8/16/87
Martha Kaiser — Date
Election Board Member

/s/ Jessica Jim — 8/16/87
Jessica Jim — Date
Election Board Member

ARTICLE XVI – APPROVAL

I, /s/ Ross O. Swimmer, Assistant Secretary of the Interior for Indian Affairs, by virtue of the authority vested in me do hereby approve this Constitution of the Pit River Tribe (Ajumawi-Atsugewi Nation). It shall be come [sic] effective upon ratification pursuant to the [sic] Article XIV of this Constitution. Nothing in the approval shall be construed as authorizing any action taken under this Constitution which would be contrary to Federal law.

12/3/87
Date
Washington, DC

/s/ Ross O. Swimmer
Assistant Secretary –
Indian Affairs